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THE INDEPENDENT REGULATORY COMMISSIONS

OF the recommendations made by the President's Committee on Administrative Management,[1] the most controverted and the most difficult to implement relates to the Independent Regulatory Commissions. It was, as well, the least expected, and to many will be the most interesting, recommendation.

Proposals to extend the merit system and establish a "career service" have long been commonplaces to those who desire "better government". Before the *Report* was published there was doubt only as to how far the Committee would go in urging that the merit system be extended "upward, outward, and downward" and as to the precise method of recruiting for and protecting "careers". On the first matter even the reformers will not say that the recommendation should have reached farther. On the second matter the Committee is not precise.

Generally expected also was the proposal to increase the number of cabinet departments and to make them homes for most of the independent agencies which Congress and the President have proliferated around Washington. Several score of such agencies have been on the loose too long. Concerning the Comptroller General of the United States, there was some doubt as to the severity of the language that the Committee would use in recommending that he be denuded of the powers which fifteen years ago an unaware Congress conferred upon him, and which the first incumbent of the office

[1] *Message of the President of the United States transmitting a Report on Reorganization of the Executive Departments of the Government.* January 12, 1937. Senate Document No. 8, 75th Congress, 1st Session.

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had vastly extended to the disregard of the duties which were his primary ones. The language is severe and the recommendation thoroughgoing.

Plain also has been the fact that any plan for governmental reorganization must extend to the White House staff. As the President said in his message to Congress: "The Committee has not spared me". Instead of an executive secretariat, which, for the last twenty years, has worked with conspicuous success in Great Britain, the proposal is for six presidential executive assistants—each, possibly, to concern himself with two of the twelve executive departments. Yielding to an urge to be cynical, the ablest of the Washington correspondents suggested that when the President recruits the six "he will have discovered six Brother Josephs to his Richelieu, six Jonathans to his David, six eremites the like of whom Washington did not know existed".[2] Coupled with this is a plan for strengthening and developing "the managerial agencies of the government"—that is, those dealing with the budget, personnel, research, and planning. For the last named task, the National Resources Committee is to return to its former dignity of being a board and to have somewhat broader terms of reference.

Such a summary of main points does an excellent report less than justice. From those who propose governmental reorganization one should demand not novelty but intelligence and forthrightness. The President's Committee has demonstrated both qualities. But one of its recommendations, in addition to being unexpected, has many elements of novelty as applied to the peculiarly American problem of independent regulatory commissions.[3] The sections on this matter are more than forthright. They are almost rhetorical.

[2] Arthur Krock, *New York Times*, January 13, 1937.

[3] By "independent" the *Report* means no more than that the commissions are outside an executive department. No list of "independent regulatory commissions" is given, but presumably under this rubric would be included the Interstate Commerce Commission, the Federal Trade Commission, the National Labor Relations Board, the Federal Communications Commission, the Federal Reserve Board, the National Mediation Board, the Federal Alcohol Administration, the Social Security Board, the United States Maritime Commission, the Securities and Exchange Commission, the United States Tariff

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Since it established the Interstate Commerce Commission in 1887, Congress "has set up more than a dozen independent regulatory commissions to exercise control over commerce and business necessary to the orderly conduct of the Nation's economic life". There has been no "consistent policy" but only "legislative groping". For just as frequently as it has established commissions, Congress has bestowed the same kind of regulatory functions on the regular executive departments. The commissions have been given powers of investigation and prosecution. They "pass in concrete cases upon the rights and liabilities of individuals under the statutes". Free of supervision by Congress or control by the President, the commissions are answerable only to the courts in respect of the legality of what they do. They are "miniature independent governments", "a headless 'fourth branch' of the government" and "a haphazard deposit of irresponsible agencies and uncoordinated powers". They have created "a confusing and difficult situation in the field of national administration". "Vested with duties of administration and policy determination with respect to which they ought to be clearly and effectively responsible to the President", they are at the same time "given important judicial work in the doing of which they ought to be wholly independent of Executive control". Hence, "they suffer from an internal inconsistency, an unsoundness of basic theory". Indeed it would be more accurate to speak, not of the "'independent' regulatory commissions", but of the "'irresponsible' regulatory commissions". They "enjoy power without responsibility" and "leave the President with responsibility without power". When they administer, they are properly subject to pressures but these create "an unwholesome atmosphere" for the adjudication of private rights. For the same men to serve both as prosecutors and as judges makes "commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself".

Commission, the Employees' Compensation Commission, the Federal Power Commission, and the Bituminous Coal Commission.

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The cure the President's Committee on Administrative Management proposes is to fit each independent regulatory commission into the appropriate executive department and to segregate its duties into administrative and judicial. The administrative duties would be handled by "a regular bureau or division in the Department headed by a chief with career tenure and staffed under Civil Service regulations. It would be directly responsible to the Secretary and through him to the President". On the other hand, so far as its judicial work was concerned, the commission would be in the department only in respect of routine matters of personnel, budget and supply. In hearing cases and handing down decisions, it would be wholly independent of the Secretary or the President. Presumably tenure would continue, as at present, for staggered terms, with removals only for cause.

Apart from economies which might result from such a division of functions—presumably within a particular department certain personnel might be used jointly for two commissions—certain other consequences would seem likely. The attention of the members of the commissions could be centered entirely on their quasi-judicial work. They would no longer be bothered by administrative problems. On the other hand, the President would not be handicapped, as he is at the present time, in stirring a commission to life and in insisting on greater activity by its administrative or prosecuting staff.

In its *Report* the President's Committee outlines its proposal in general terms. It is not dogmatic in maintaining that the same medicine should be administered in a dose of the same size to each of the regulatory commissions. The principle of the plan would "not have to be applied with exact uniformity to every commission". After administrative and judicial sections were under the same roof, details could be worked out experimentally. "The precise division of labor between them could also be readily modified in the light of experience, and the shifting of a function from one section to the other would not raise the major jurisdictional controversies that sometimes result from proposals to alter the status or duties of an independent commission."

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Of necessity the *Report* could make no extended argument, in support of the recommendation, either by analysis of function or by analogy. Non-detailed mention is made of the fact that for thirty years the regular departments have had regulatory powers which do not differ in kind from the functions handed over to the commissions. One specific illustration is given: "the powers of the Secretary of Agriculture under the Packers and Stockyards Act are essentially the same in nature and importance as those of the regulatory commissions".[4] There are twenty similar laws.

Again, the principle recommended works successfully in the legislative courts, like the Customs Court and the Court of Claims, and with the Board of Tax Appeals. It works also "in those departments and agencies (e. g., the Treasury, the Veterans' Administration, the Patent Office) in which have been set up appellate bodies, judicialized in varying degrees, which sift and review the preliminary decisions and orders of administrative affairs"—bodies similar to the British "Ministerial Tribunals". In short, there is a good *prima facie* case for Congress to act as the *Report* recommends, and for the President, after study, to proceed to implement his authority in the case of particular commissions. I venture to supplement that *prima facie* case by brief discussions of four relevant matters.

One is negative: that Congress has sought to protect the commissions against removals by the President on partisan grounds has little or no bearing on the merits or demerits of the proposal made by the President's Committee. Secondly and thirdly, the case made out by the Committee is supported by the experience of two agencies, one state and one federal, which have worked successfully along the lines of its recommendation and of which I have some personal knowledge. In the study of public administration, experience has its place along with principles. Finally, when the Committee's recommendation comes to be implemented, lessons may be learned from the methods employed by a British inquiry into a similar problem.

[4] Stafford *v.* Wallace, 258 U. S. 495 (1922).

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I

It is a pity that the decision of the Supreme Court of the United States in the so-called *Humphrey* case[5] preceded the Committee's recommendation in which some persons may see an entering wedge of presidential dictation to the commissions in respect of their judicial work. Thus to the Special Committee on Administrative Law of the American Bar Association, "the cause of judicial independence was carried a step (but only a step) forward with the decision."[6] Walter Lippmann, hailing the *Report* as a whole, said that the proposal for the commissions "appears at first glance to be the most dubious part of the program", for he had supposed "that the true line of development was to make them [the commissions] increasingly judicial and independent". David Lawrence rejoiced that since the *Humphrey* case "there has been a recognition of the power of Congress to stipulate freedom and independence for the governmental commissions". That presumably well-informed commentators express such views gives point to the point with which I close this discussion. Here I suggest that the *Humphrey* case is irrelevant.

In *Myers v. United States*,[7] the Supreme Court, holding that, despite a contrary act by Congress, the President could remove a postmaster without the advice and consent of the Senate, by dictum swept from the statute book various laws providing that the President could remove certain officials only for "cause", "neglect of duty" or "malfeasance in office". The decision said:

> There may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole

[5] Samuel F. Rathbun, as Executor of the Estate of William E. Humphrey, Deceased *v.* United States, 295 U. S. 602 (1935).

[6] *Report*, 1936, p. 227.

[7] 272 U. S. 52 (1926).

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> intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

So spoke Chief Justice Taft, doubtless with memories of his own experience as president.

Nine years later, in the *Humphrey* case, the Supreme Court had before it the Federal Trade Commission Act which provides that the President may remove commissioners only "for inefficiency, neglect of duty, or malfeasance in office". In removing Humphrey the President made no charges. The Court held this act illegal and dismissed the *Myers* case by saying that, in so far as its expressions "are out of harmony with the views here set forth, these expressions are disapproved".

To Howard Lee McBain, writing in these pages,[8] it did not appear that the *Myers* case was of any great political importance. The Senate could still assert itself in connection with its power to confirm new appointees; and continued congressional restrictions on removal (there are such in respect of the recently established commissions), if not "legal compulsions", would "serve as moral guide-posts—perhaps even as danger signals." Events—or rather lack of events—proved Mr. McBain correct in anticipating few "institutional consequences of this decision".

No "institutional consequences" are to be expected from the *Humphrey* case. It is a *secret de Polichinelle* that President Roosevelt considered following the statute and laying down "causes" for the removal of Mr. Humphrey. His legal advisers were wrong in guessing that the gentler course of removal without the cause being stated was covered by the *Myers* case. They did not know that a Chief Justice who narrowly missed occupying the White House would differ from a Chief Justice who had lived there. If "inefficiency" or "neglect of duty" had been alleged and the President had then removed, the Court, without an unpalatably drastic reversal of the cases, would not have reviewed the question of

[8] "Consequences of the President's Unlimited Power of Removal", POLITICAL SCIENCE QUARTERLY, December 1926.

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whether the President had "proved" his charges. In other words, the President could have stated his case against Mr Humphrey as provided by the statute and, after a hearing, could have removed him. He has the same opportunities in respect of other members of the protected commissions. The *Myers* case was taken advantage of only once. The *Humphrey* case will not put presidents in straight jackets.

II

In New York State the administration of the Workmen's Compensation Act has undergone several legislative permutations. At first (1914), administration was by a commission of five, separate from the Department of Labor. In 1921, administrative power was vested in a single person, the Industrial Commissioner (who heads the Department of Labor), and the quasi-legislative and judicial powers were given to an Industrial Board of three members. After 1926 the Board had five members.

For a time this dual system worked well. In 1928, however, dissatisfaction became widespread. There were criticisms from employers, insurance carriers, more than the usual number of claimants, and legislative committees. The Governor decided to intervene and ordered an investigation under the Moreland Act which permits the chief executive "either in person or by one or more persons appointed by him for the purpose, to examine and investigate the management and affairs of any department, board, bureau, or commission of the state".[9]

After an extended investigation the Commissioner expressed the opinion that the difficulties arose from the placing of administration under the Industrial Commissioner when it had better be under the appellate judicial tribunal, the Industrial Board, and recommended that "the Industrial Board be given administrative as well as judicial control over the Bureau of Workmen's Compensation and its staff"—the Bureau to be

[9] Executive Law, Section 8. The Commissioner is empowered to subpœna and enforce the attendance of witnesses, to require the production of papers, etc. By a continuing appropriation, the legislature provides for the expenses of such investigations.

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kept within the Department of Labor for purposes of "administrative housekeeping".[10] This analysis of the situation was superficial and the recommendation was unjustified.

Some months after the presentation of this *Report,* the administration of the Workmen's Compensation Bureau took a decided change for the better. I then came to the conclusion that it had been an error to recommend a legislative rearrangement of function. The difficulties which I had thought flowed from the statute were attributable to the frailties of persons. No serious criticism had been made during the previous administration when the Industrial Commissioner had been the Honorable (now Mr. Justice) Bernard L. Shientag. He had a personal interest in workmen's compensation and refused to allow the efficiency of the Bureau to depend on the ability of its director. Judge Shientag was thoroughly familiar with hearing procedure; he occasionally (as he was authorized by the statute) sat, himself, as a referee; he recognized the importance of referees pooling their knowledge and experience and he consulted constantly with members of the Industrial Board. Later, there was an Industrial Commissioner of a different temperament who sat in solemn isolation and left the administration of the Bureau to an unimaginative director. Then administration was inefficient. Later (after the presentation of the *Report*), the Industrial Commissioner was Miss Frances Perkins who had been chairman of the Industrial Board.[11] She took to her new office a comprehensive and intimate knowledge of the way in which the act was being administered throughout the state and reorganized the New York City Bureau under the direction of an assistant commissioner who in an up-state office had achieved an outstand-

[10] State of New York: *Message of the Governor, transmitting the Report of Commissioner Lindsay Rogers, appointed to examine and investigate the administration of the Department of Labor.* No. 49, Legislative Document (1929).

[11] Miss Perkins dissented from the recommendation that the administration of the Bureau be placed under the control of the Industrial Board on principle and also on the ground that some of her attention would have to be taken from her quasi-judicial work and devoted to tedious and exhausting administrative detail. Ironically enough, as Industrial Commissioner, she had to assume administrative responsibility.

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ing success. Matters came to be dealt with no less expeditiously, smoothly and expertly than they had been when Judge Shientag was Commissioner. With no changes in the law, changes of personnel could result in harmony taking the place of disunion and smooth operation succeeding chaotic delays.

That at the time I had a partial recognition of all this seems to be indicated by certain language used in the *Report*. I suggested that the dual "system could work only if the administrative officer were actually, even though not by law, a member of the Board which had judicial authority, and if he administered his office with the benefit of constant advice from the judicial body which must have the best (if not the only) knowledge of the work being done by the subordinate staffs." I added that the attitude of the administrative officer "greatly intensifies the difficulties which could be avoided only by close cooperation between the Industrial Commissioner and the Industrial Board and the exercise in concert of the administrative and judicial powers shared between them". The proper remedy was a change of personnel not a change of law.[12]

III

In August 1933, the Special Board for Public Works adopted a resolution setting up certain minimum wage rates for skilled and unskilled labor in different sections of the country, protecting union scales which had been in effect on April 30, 1933 and providing that labor disputes should be submitted to a Board of Labor Review.[13] These requirements were put in

[12] In his volume, *Administration of Workmen's Compensation*, Walter F. Dodd, commenting on my *Report*, remarks that "changes in personnel made the New York plan workable" but adds: "the possibilities of conflict and administrative disorder still persist, however, under any plan which sets up independent bodies which must act as a unit in order to produce satisfactory results" (p. 790).

[13] "*Be it further resolved*, That there shall be created a Board of Labor Review which shall hear all issues arising under the operation of all contracts financed from funds appropriated by the Administrator of Public Works under the authority of the National Industrial Recovery Act and from such problems as may result from fundamental changes in economic conditions during the life of these contracts. The Board of Labor Review to be created shall consist of three members; one to represent labor, one to represent contractors, and a Chairman who shall represent the Federal Emergency Administrator of Public Works. The members of this board shall be appointed by the President

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all contracts. For non-federal projects the contracts provided that " decisions of the Board of Labor Review, *including decisions as to its jurisdiction to act upon the application of persons not parties to this contract,* shall be binding upon all parties ".[14] As the work of the Board developed, cases came to it not only at the instance of the building trades' unions or nonunion groups of dissatisfied workers. The term " labor issues " was broadly interpreted and came to mean any dispute concerning wage rates, whether the dispute was between a federal contracting officer and a contractor, between a state engineer and a contractor, or between a borrower and a resident engineer inspector. Cases were also brought by the Division of Investigations of the Federal Emergency Administration of Public Works which, sometimes because of specific complaints and sometimes of its own initiative, inquired into the classification of workers and reported any *prima facie* case that a contractor had violated the wage regulations. Federal contracting officers and the Inspection Division of the Federal Emergency Administration of Public Works (which kept close control over the enforcement of the contracts for non-federal projects) had the power to order contractors to reclassify labor and to readjust wages. In many cases such orders were given and obeyed. In other cases, however, because the administrative officers were not equipped to hold hearings and to make " quasi-judicial " rulings, they brought the cases to the Board of Labor Review.

When the Board began to function in the winter of 1933-34, it could not foresee whether its work would be heavy or light. Its members were not full-time officials. They wished to function only when it was necessary to hold hearings. Primarily for this reason, but also because any independent staff of investigators set up by the Board would have had tasks much the same as the tasks of the staffs already recruited by the

of the United States but no member shall be connected in any way with any organization of building workers or directly connected with, or have any interest in, contracting. The Chairman shall not be in any way connected with the Federal Emergency Administration of Public Works. Decisions of the Board of Labor Review shall be binding upon all parties."

[14] In the federal contracts the language was somewhat different. In both cases the draftsmanship was faulty. There were ambiguities, but the Board of Labor Review sought to avoid difficulty by not making unwarranted claims of jurisdiction or power.

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Administrator, the Board decided that it would not have as employees of its own any persons other than those necessary to prepare cases for hearing, to record and circulate the decisions, and to effect liaison with the appropriate agencies of the Federal Emergency Administration of Public Works and with the appropriate departments or bureaus in Washington which were spending Public Works' money under regulations providing for the submission of labor disputes to the Board. This would restrict the Board's duties and would prevent duplication. The rule was departed from only occasionally when some special situation made it desirable for a representative of the Board to inquire into a controversy on the spot.

Not infrequently, in order to have neutral views on the issues in controversy, the Board borrowed neutral experts from different departments. Thus the Board, in respect of certain controversies on the Midtown Hudson Tunnel in New York City (the construction was under the supervision of the New York State P. W. A. engineer), received advice from an eminent consulting engineer on another P. W. A. board, and from officers of the United States Army corps of engineers who were thoroughly familiar with the problems of heavy construction. In a wage controversy involving the Treasury's Public Health Service which was building certain ships, the Board was advised by experts from the Coast Guard which had built similar ships, without controversy. Resort was frequently had to the conciliation service of the Department of Labor and to the National Re-employment Service. In no case was the agency appealed to other than eager to render assistance.

From the beginning the Board endeavored to allow administrative officers to settle as many labor disputes as they possibly could. Cases were docketed and heard only when administrative adjudication proved unsuccessful. Hence a law of diminishing returns applied to the cases which had to be heard. Many disputes coming to the Board were sent back to the appropriate officer with suggestions as to how they might be settled without the necessity of a formal decision. The remaining disputes—several hundred—were docketed for hearing and decision.[15] In some of these cases the inquiry which preceded

[15] No decision was taken into the courts before 1936.

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the unsuccessful administrative adjudication was a sufficient preliminary inquiry for the hearing of the issues before the Board. In other cases the Board requested those who had worried with the matter administratively to procure further information in advance of the hearing. In some cases the Board sought neutral assistance by borrowing appropriate persons from appropriate agencies.

Opinions may differ as to whether this particular Labor Board functioned successfully, but it cannot, I think, be said that the separation of "judicial" from administrative functions resulted in any inefficiency or caused any embarrassment. The experience, however, warrants brief generalizations on the advantages of a division of functions and on the conditions which must obtain if the division is to work well. The former I saw too dimly in the case of the New York Bureau of Workmen's Compensation.

The great advantages are that the time and energy of a board can be devoted exclusively to the hearing and adjudication of cases. The board has no responsibility for, and need not be greatly worried by, administrative laxity or excessive strictness. There is no unconscious urge to issue decisions which will not repudiate opinions expressed by subordinate agents. On the other hand, there is difficulty if the administrator's agents and the board are aloof and hostile. This is not a matter of legal relationships but of common purpose and understanding. In the hearing of cases which it has not been possible to settle administratively, those who hold the hearings learn more about the abilities and prejudices of administrative agents than their chief can learn. The chief must be willing to receive such information and, if he deems it wise, act upon it by promoting, demoting or removing. From the administrative persons, of whom some should follow closely the work of the board, the latter can learn a great deal. The lesson can be given with less diffidence and is more likely to be heeded than when the relationship is that of superior and subordinate. Finally, as has been said, with a separation of functions, a board should have less embarrassment in overturning administrative rulings than it would have if the functions were joined. The corollary of this, however, is that the administrator's

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agents should endeavor not to be reversed by the board and that the board should hope that its reversals would be few.

IV

Manifestly there should be no precipitate action to give effect to the recommendation of the President's Committee. Indeed, the Committee seems more concerned about the future than about the present. It insists on no mixture of functions in the future. It hopes that existing mixtures may be unmixed. If Congress should give the President authority by executive order to attach certain commissions to appropriate departments, he would act only after careful consideration and in the face of strong pressures not to act at all. I suggest that he act only after a quasi-judicial inquiry into the precise nature of the mixture of legislative, administrative, quasi-judicial and judicial powers possessed by each commission. Such an inquiry could be *ad hoc,* so that piecemeal action could be speedy. This would have many beneficial results.

The methods of such an inquiry, I suggest, should be modeled on the methods of the Committee on Ministers' Powers which five years ago reported on a similar problem in Great Britain.[16] Under its terms of reference, the Committee on Ministers' Powers was "to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision."[17] As is well known, the occasion for the appointment of the Committee was the public discussion and uneasiness which followed the publication of Lord Hewart's *The New Despotism,* in which, as Felix Frankfurter remarked, the Lord Chief Justice

[16] *Report of the Committee on Ministers' Powers* (presented by the Lord High Chancellor to Parliament by Command of His Majesty, April, 1932). Cmd. 4060.

[17] Mr. W. A. Robson says that this presented "the curious spectacle of the conclusions at which the Committee is expected to arrive being embodied in its terms of reference. The Committee started life with the dead hand of Dicey lying frozen on its neck." But this was hardly the case. The Committee could have reported that a system of administrative courts (as advocated by Mr. Robson) was necessary to secure the sovereignty of Parliament and the supremacy of the law. It did inquire into this matter. "The Report of the Committee on Ministers' Powers", *The Political Quarterly,* vol. III, no. 3, 1932, p. 351.

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descended from the bench and made a stump speech. In England, of course, the problem differs from ours. There judicial review is severely limited. With us it has been so broadened that it alarms the three Supreme Court justices who are frequently together in a minority.[18] Parliament gives ministers statutory powers to amend existing acts of Parliament or even the enabling act itself "to remove difficulties". In the "hot oil" [19] and "sick chicken" cases [20] the Supreme Court held that Congress had carried delegation too far. So broad was the language of the opinion that mental gymnastics were necessary to uphold a delegation of authority to the President to determine when the export of arms should be prohibited.[21] In England, finally, there has been no mushroom growth of independent regulatory commissions. There are few ministerial tribunals. The great bulk of the judicial or quasi-judicial [22] decisions in question are made by the "Minister". But these differences have no bearing on the appropriateness of methods of inquiry.

What the Lord Chancellor's Committee did was to ask the departments to prepare for it a list of all powers within its terms of reference which had been conferred upon ministers; "examples of the various types of regulation, rule or order making power, selected by reference not to subject matter, but to the form and procedure prescribed, and to the safeguards applicable", and "examples of types of judicial or quasi-judicial decisions which *are* subject to appeal". The answers which were confined to statements of fact are published in a companion volume to the *Report of the Committee on Ministers'*

[18] See the concurring opinions of Justices Brandeis, Stone and Cardozo in St. Joseph Stock Yards Company *v.* United States, 298 U. S. 38, 73 (1936).

[19] Panama Refining Company *v.* Ryan, 293 U. S. 388 (1935).

[20] Schechter *v.* United States, 295 U. S. 495 (1935).

[21] U. S. *v.* Curtiss-Wright Corp., Curtiss Aeroplane and Motor Company, Inc., and Barr Shipping Corporation, *et al.* Decided December 21, 1936. 57 Sp. Ct., Reporter 216.

[22] "Generally speaking, a quasi-judicial decision is only an administrative decision some stage or some element of which possesses judicial characteristics." *Report*, p. 81. Sir John Anderson defined quasi-judicial functions as those "in the exercise of which there enter the three elements of fact, law, and policy." *Minutes of Evidence*, vol. II, p. 89, Question 1253.

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Powers. The Committee suggests that they contain "much valuable information". That is a correct judgment only if it is so phrased in order to emphasize by understatement.

The second companion volume to the *Report* consists of *Minutes of Evidence*. Because the Ministry of Health, the Ministry of Transport and the Board of Trade have such large powers, their departmental memoranda were supplemented by oral evidence. There were official witnesses—all expert (the Treasury Solicitor, the Parliamentary Counsel to the Treasury, the Editor of the Statutory Rules and Orders)—and oral or written evidence from individuals of special competence and from organizations which were interested in certain matters covered by the Committee's terms of reference. American students have, I think, tended to confine themselves to the *Report* and to ignore these bulky companion volumes which are a rich mine containing the ore of knowledge and the gold of wisdom. There can now be no dispute over the facts as they were in 1930. And in the views expressed by the witnesses and the colloquies between them and the Committee's members will be found more light on the problem of governance in the modern state than is shed by half a dozen academic treatises. If, for example, the draftsman of the Report of the Special Committee on Administrative Law of the American Bar Association had read Sir John Anderson's examination—almost cross-examination—of Mr. W. A. Robson,[23] he might have concluded that the case for administrative courts was not as simple as he was making it. He would certainly have emerged from the reading with the firm conviction that Sir John Anderson well deserved his reputation as one of the brightest lights produced by the British civil service. He might well have pondered on the desirability of a similar colloquy between, say, Joseph B. Eastman and Felix Frankfurter or John Dickinson.

There was another result of the British Committee—inarticulate and indirect—but nevertheless real and highly important. In preparing, for the Committee, statements of the powers they had and descriptions of the manner in which they acted, the departments were compelled to think about what they were

[23] *Minutes of Evidence*, Sixth Day, vol. II, pp. 81 *et seq.*

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doing.[24] They were compelled to think further when the three most important departments (from the standpoint of delegated legislation) presented oral testimony. The *Minutes of Evidence* were studied by officials who did not appear before the Committee. Apart from recommendations of reforms, the Committee's inquiry must have had a salutary effect on all ministers and on all members of the British civil service who dealt with matters covered by the terms of reference.

In the United States knowledge of present facts is no greater than it was in Great Britain before the Lord Chancellor's Committee was set up. If, despite longstanding attention to draftsmanship and to the publication of delegated legislation and, in addition, to the information which emerges from ministers defending their acts in Parliament, the Committee found it necessary to request the preparation of a detailed conspectus of the situation, then there is, I think, a clearer case for similar inquiries in Washington. They can, appropriately, be piecemeal inquiries to prepare the way for the separation of the administrative and judicial functions of a particular commission. If properly conducted, they will undoubtedly suggest that, while certain plants should be divided, others should be grafted together and still others should be killed. Perhaps President Roosevelt will ask his Committee to stay in existence to conduct such inquiries and give it authority to coöpt a specialist member or so, as the work of particular independent regulatory commissions is examined.

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[24] "An outsider examining administration in a department of the State government frequently sees tendencies which seem vague or even invisible to those in the department. Officials of a department are concerned with the day-by-day administration of the law and with individual cases as they arise. The burden of their work may be so great and their attention may be so centered on individual decisions that they have neither the time nor the inclination to ask questions about the larger problems of administration. An examination of any department of the government, therefore, is worth while even in the absence of specific suggestions of wrongdoing or inefficiency. You suggested this when you appointed me Moreland Commissioner, and the observation is particularly true in respect of a department which deals with so difficult and complicated a subject as the administration of the Workmen's Compensation Act." New York State: *Message of the Governor, etc.* Legislative Document No. 49 (1929).

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CONTRASTS IN THE PROGRESS OF INDUSTRIALIZATION IN CHINA AND JAPAN *

THERE arises sooner or later in any study of the Far East the enigma of the unequal progress of industrialization in the two major Oriental countries, China and Japan. In a comparatively brief period of contact with the West, Japan has made remarkable advances in the adoption of Western methods of manufacture, transport and defense, and now ranks economically and politically with the more powerful countries of the world. China, with a somewhat longer contact, has made the barest beginning, with modern industries confined mainly to a few seaboard cities and with a railroad mileage insignificant in relation to the vast territory of the country. Why should the one country have accepted mechanical power, the machine and the factory so readily, and the other country so reluctantly? Why has China continued to offer active opposition or at least indifference to the industrial system of the West? There is no single or simple answer to these questions. The present contrasting economic positions of Japan and China are the result of many conflicting and interacting forces—prejudice and superstition, cultural tradition, the old economic system, political conditions. Fundamental to these forces is the contrast in the geographic background of the two countries—small size and compactness as opposed to a large area and diversity, insularity against continentality.

* This article is a part of a study of the industrialization of the Far East being made under the auspices of the Council for Research in the Social Sciences of Columbia University. Previous publications have included the volume *Japan's Economic Position*, and several articles, two of which, "Analysis of Japan's Cheap Labor" and "Man-Power in China", both by Dorothy J. Orchard, appeared in the POLITICAL SCIENCE QUARTERLY for June 1929, and for December 1935 and March 1936, respectively. The present article is based upon data obtained in Asia in 1926-27 and 1931-32 supplemented by reference to available published material. In 1931-32 the author traveled in China as a fellow of the John Simon Guggenheim Memorial Foundation.

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I cannot emphasize too strongly that the present discussion is not an argument for or against industrialization in the Far East. It is not a brief for the superiority or inferiority of either the Chinese or the Western economic systems. It is based upon the observed experience that wherever machine industry and the factory have come into contact with a workshop and handicraft economy, the latter has given way. It accepts the fact of the penetration of industrialization into the Far East. It attempts to explain the strikingly contrasting rates of that penetration into Japan and China.

Two possible explanations of the differences of the two countries—the supply of raw materials and the creative ability of the people—applicable perhaps in other countries, can be dismissed here with little consideration since the greater industrial development has taken place in the country of more limited resources and less evident originality. China possesses raw materials for manufacture in much greater abundance than does Japan and, though their extent has been exaggerated, they are ample for a much greater degree of industrialization than has occurred. One hesitates to become too dogmatic in any statements on inherent qualities of peoples, particularly of peoples so closely related racially as are the Japanese and the Chinese, but if there is any difference in originality, China would seem to have the stronger claim to creative ability.

Chinese Opposition to Industrialization

One of the forces retarding the introduction into China of Western culture, including industrialization, has been the active opposition of the Chinese people, an opposition not always rational but for the most part traceable to definite causes that will be examined in later paragraphs. An antagonism to things foreign and a preference for things Chinese have made difficult any wide acceptance of new products or of new methods of manufacture. The antagonism has been strengthened by superstitions, often aroused and played upon by officials for their own ends. Railroads and mines, particularly, have been opposed as possible disturbers of *feng shui,* the geomancy of a locality. Repeatedly, in many sections of the country, a survey for a new railroad or an attempt to exploit mineral resources

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has so stirred the fears of the country people that the foreigners have been forced to cease their activities and withdraw.

Superstition and antagonism have not been directed toward foreigners alone. A prominent Chinese industrialist has told me that he had great difficulty with the local people, the gentry and the municipal authorities when he opened the first flour mill in Wusih in 1894. The mill was situated near a Confucian temple, and it was argued that it would violate the dignity of Confucius. The people also believed that the tall chimney would bring bad luck and that flour from such a place might make them ill. Difficulties occurred over several years. There was fighting, and the governor of Kiangsu Province, who was sympathetic to the project, finally arrested over one hundred people and removed the mayor of Wusih from office.

It was true also that the proprietors of the old stone mills objected to the innovation because it cut in upon their trade. Such opposition, economic in its motive, was frequently shown by the classes most directly affected by the new industries—workers, consumers, competing handicrafts. For at least ten years following the introduction of power vessels on the upper Yangtze, there was a bitter struggle between the junkmen and the steamers. The junkmen, as their trade was cut in upon more and more, insisted that the transport of tung oil, salt and certain other bulk products be reserved exclusively to them.

The earliest silk mill erected in the Canton area in 1866 was moved to Macao because of pressure brought by silk producers using the old methods. Even as late as 1881, there were serious anti-machinery riots in the same area. Troops were called, and the filatures were closed for a time by the government authorities. It was then urged by the officials that enterprises involving the use of labor-saving machinery should be undertaken only under government auspices, in order to prevent merchants from amassing large amounts of capital to the detriment of the working class.[1]

Sometimes, the early enterprises failed because of the refusal of the people to accept the product and because of their insistence that it was of inferior quality. This opposition was par-

[1] China, Imperial Maritime Customs, *Reports on Trade, Canton, 1881*, pp. 7-9.

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ticularly important in the food industries. Though rice milling was started in Shanghai in 1865, as late as 1900 the strong prejudice against the machine-milled product forced the closing of a mill, established by American merchants, after a brief period of operation. In the Wuhan cities, Hankow, Wuchang and Hanyang, modern rice mills did not appear until 1909, and in Chekiang Province, the first mills, established in 1912, failed because their product was considered unwholesome.

The earliest wheat flour mills in Hankow were a failure because they were equipped to turn out a fine flour so different from the coarse product to which the farmers were accustomed that they refused to use it. Later, the mills turned to the production of a coarser flour and were more successful. For a number of years after a modern flour mill had been established in Shansi Province, its product was shipped to neighboring provinces because of the preference of Shansi people for flour from the native mills, a preference due in part to its particular qualities and in part to its lower price.

Somewhat distinct from this active and almost personal resistance to the new industries, there was the general passive opposition of the Chinese people, and the absence of any particular interest in the methods and the institutions of the West. It was an attitude in marked contrast with the reaction of the Japanese. Equally isolated for centuries and equally averse to all foreign contacts, Japan, once the opening of the country had been forced, quickly recognized the source of the strength of the West and hastened by every means possible to adopt Western technique and methods in defense, in communications and in industry. There were a few Chinese who were aware of the Japanese interest in Western science and who seemed to recognize the implications of that interest.[2] Most of the Chinese, however, remained hostile or at least indifferent to innovation, an attitude illustrated by the complacent "What's the good?" with which they met some of the early attempts to

[2] Memorial of Prince Kung on the Establishment of a College for the Cultivation of Western Science, translated in *North China Herald*, Shanghai, June 24, 1887; and Chang Chih-Tung, *China's Only Hope, An Appeal by Her Greatest Viceroy*, translated from the Chinese edition by Samuel I. Woodbridge (New York, 1900), pp. 89, 91, 92-95.

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introduce European methods of reeling silk.[3] Though the machine reeling of silk was introduced into China ten years before it reached Japan, the early filatures were closed almost immediately, and by 1900 the industry in Japan had made much greater progress in modernization. In 1902 and again in 1909, requests of the Silk Association of America to adopt a uniform method of reeling were ignored by the Chinese producers at a time when the standardized silk from the Japanese factories was overtaking and passing the Chinese silk in the world export trade.[4]

Sir Rutherford Alcock wrote in 1869 that he could see in China no desire for the building of railroads or telegraph lines. Eight years later, the *North China Herald* commented editorially that China was as backward as when foreigners first came to the country.[5]

Japanese Acceptance of Industrialization

Chinese indifference and Japanese acceptance of the West may be traced very largely to certain fundamental contrasts in the cultural, economic and geographic backgrounds of the two countries. Japan had escaped invasion partly because there was no neighboring maritime power to try the defenses of an island position, partly through the aid of the elements, as had been the case in the destruction of the two Mongol armadas by typhoons, and partly because the country possessed no great riches to tempt a conqueror. With the penetration of the Western nations into the Pacific, however, the threat of conquest became very real. The area of Japan was small and there was no great land mass beyond the reach of the invader. Since the population and the cities were situated along the seaboard, the dangers of permitting any penetration by the foreigner could be recognized by all. Any faith in Japanese arms that re-

[3] "Commercial sur Canton", by C. Imbault Huart, French Consul, Canton. Quoted in *The China Review*, Hongkong, vol. XXII, 1896-1897, pp. 748-750.

[4] C. W. Howard and K. P. Buswell, "A Survey of the Silk Industry of South China", Ling Nan Agricultural College, Canton Christian College, *Agricultural Bulletin*, No. 12, January 1925, p. 7.

[5] *North China Herald*, June 9, 1877.

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mained after the visit of Commodore Perry was dispelled completely by the Westerners' use of the gunboat policy against the Satsuma and Choshu clans in 1863 and 1864.

After the development of an active trade under the Ashikaga shoguns in the fourteenth, fifteenth and sixteenth centuries, Japan had withdrawn into seclusion early in the seventeenth century very largely to escape foreign political and religious intrigue. For two hundred years, contact with the outside world was closely restricted, and Japan, under the Tokugawas, remained more or less static both politically and economically. Commodore Perry happened to be the instrument for reopening Japan and for bringing to a close this period of isolation, but it would have ended shortly if he had never taken his historic voyage. The internal economy of Japan was breaking down. During the two centuries, there had been little or no increase in population, and famines had led to agrarian disorders. The government was in financial difficulties and debasement of the coinage was resorted to repeatedly. The area and the resources of Japan were too limited to continue to support the population adequately in a self-sufficient agricultural and handicraft economy. The weaknesses of the existing system were evident; the time was ripe for the introduction of a new order.

By the time the barrier of isolation was broken, Europe and America were so well advanced mechanically that the advantages of the machine were strongly apparent. In the wholesale and immediate adoption of all that the West had to offer were seen not only the one effective protection for helpless Japan but also a possible solution of internal economic difficulties. There was ample precedent for the acceptance of institutions not Japanese, for in earlier periods Japan had already borrowed much from China and Korea.

Chinese Continentality vs. Japanese Insularity

China, on the other hand, could look back upon an ancient civilization and upon conquests that had brought much of Asia under the control of the ruling dynasty. There was a consciousness of position, and a sense of superiority and of self-sufficiency, as far as the West was concerned, typified by the

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continued insistence that any mission from Europe came to bear tribute to the Emperor from a subordinate ruler. Such complacency rested in part upon China's huge area and many climates capable of producing a wide variety of products to meet the needs of the country. It was nurtured also by a continental position with a land mass and a large section of the population quite remote from the seacoast where the foreigners had established contact.[6] There is perhaps an analogy in the provincial indifference of the inhabitants of the Middle Western sections of the United States to a merchant marine or to foreign problems. In the sixteenth and seventeenth centuries, there were many indications of a conflict of interest in China on the question of foreign trade. The coastal provinces, such as Fukien and Kwangtung, favored commercial intercourse with the Europeans; the officials of the inland imperial capitals insisted upon isolation.[7] During this period, there was a law forbidding Chinese subjects to go abroad even for purposes of trade. It is significant that the law could not be enforced in the Province of Fukien.

The earlier traders, notably the Arabs, who had visited China in the eighth and ninth centuries, had been isolated successfully in settlements on the coast.[8] The same policy was adopted toward the Europeans and with success for a time, since the

[6] Hu Shih in his discussion of the progress of industrialization in China and Japan in *The Chinese Renaissance*, page 4, has stated: "We may very well ignore the relative size and geographical position of China and Japan as decisive factors. For, while a country of small size and insular position may be more readily modernized in matters of communication and transportation, it may be argued with equally convincing logic that a continental empire with vast territory and resources has greater advantages than her island neighbor." The statement is probably true in so far as it applies to the ultimate success of industrialization in China and Japan, but it is not true when it dismisses as unimportant the influence of size and position in the introduction and development of industry in these two countries. Hu Shih has failed to distinguish between the advantages for ultimate success and the difficulties of first introduction.

[7] Chang T'ien-Tse, *Sino-Portuguese Trade from 1514 to 1644, A Synthesis of Portuguese and Chinese Sources* (Leyden, 1934), pp. 81 *et seq.*

[8] *Ibid.*, p. 7; also Chau Ju-Kua, *His Work on the Chinese and Arab Trade in the 12th and 13th Centuries entitled Chu-fan-chi*, translated by F. Hirth and W. W. Rockhill (St. Petersburg, 1911), p. 18.

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Chinese were really the masters of the situation until the Opium War with England in 1839, when the strength of the foreigner was first clearly demonstrated. Even with the recognition that the Europeans were something more than traders, there was the feeling that they were simply other invaders who would be absorbed as earlier conquerors had been. In the meantime, China, with a huge area, could view with a certain degree of equanimity the nibbling off of small sections of the coast, a development that Japan could not tolerate. This confidence of size and of the ultimate capacity of China to absorb is an inherent part of Chinese philosophy. It is expressed frequently today by educated and intelligent Chinese with reference to the Japanese penetration.

The thesis has been advanced by some Western scholars that the chaos and the maladjustments in China of the past century have arisen from the failure of the Chinese to take the true measure of the arrivals by sea, beginning with the sixteenth century, and from the attempt to apply toward the Europeans the same policies that had succeeded with the barbarians from beyond the Great Wall. Such reasoning gives too much emphasis to the sea approach. Much more significant was the fact that the new invaders had developed a machine technique for industry, the strength of which the Chinese did not appreciate, and possessed in their ships the means of maintaining an uninterrupted contact with a remote base. It should be remembered that for two centuries China did hold the sea powers at bay. The weakness of China became apparent only with the mounting strength of an industrialized Europe in the nineteenth century. The contrast was not the sea frontier against the land frontier, nor was the conflict between the West and the East. It was the machine and capitalistic enterprise against an agricultural and handicraft society. The same struggle had occurred in Western Europe where the machine economy had developed gradually and had finally emerged supreme. In China, however, the lines of conflict were more sharply drawn since that country did not come into contact with the machine economy until it was more or less fully grown and more completely antithetical to the established economic order. At the

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present day, Westernization has put its mark effectively only on the coastal fringe of the country. In the interior, there is still suspicion of industrialization as well as antagonism to its advance. The small size of Japan was undoubtedly a factor in the more rapid penetration of the new economic order to all parts of that country.

In their dealings with the Russians, who came by land, the Chinese certainly showed no greater wisdom than they did in their dealings with the Europeans who came by sea. Regarded as merely a new barbarian tribe, the Russians began their penetration before the Treaty of Nerchinsk of 1689. Dormant for a time, Russian penetration became particularly active toward the end of the nineteenth century with the building of the Trans-Siberian Railway and its extension into Manchuria. Until they were halted by Japan, Russian encroachments on Chinese sovereignty were quite as threatening as any advance that had been made by way of the sea by Great Britain, France or any other Western power.

Self-Sufficiency of Chinese Economic System

China's sense of superiority over the West and the tardiness in recognizing the potentialities of the machine may be explained by the possession of an established and going economic order. It had served the country for centuries, and it faced no such breakdown as did the economic system of Japan. It had supplied the needs for food and manufactures and had made China practically self-sufficient. As Sir Robert Hart wrote many years later,

> China needs neither import nor export, and can do without foreign intercourse. . . . Chinese have the best food in the world, rice; the best drink, tea; and the best clothing, cotton, silk and fur. Possessing these staples, and their innumerable native adjuncts, they do not need to buy a penny's worth elsewhere; while their Empire is in itself so great and they themselves so numerous that sales to each other make up an enormous and sufficient trade, and export to foreign countries is unnecessary.[9]

[9] Sir Robert Hart, *These from the Land of Sinim* (London, 1901), p. 60.

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China's first direct contacts with Europe early in the sixteenth century certainly did nothing to make foreign trade attractive. The Industrial Revolution had not begun, and China was quite well advanced in manufacturing. The Chinese standard of living was probably as high as that of most of the other peoples of the world, and Chinese culture was much admired in European countries.[10] There was a keen demand for Chinese products, but the West had little that was desired by China. One of the problems of the European traders was to obtain an outgoing cargo that could be exchanged for the coveted Chinese goods which included tea, raw silk, silk cloth, quicksilver, vermillion, copper, chinaware and numerous other items.

So unimportant was the European trade considered by the Chinese court officials that in 1522 the Portuguese, the first of the Western European traders, were expelled from Canton by imperial order for their refusal to abide by Chinese regulations. They insisted, however, on continuing their trade under cover through other ports. By the middle of the century, through their settlement at Macao, they had gained a practical monopoly of the Sino-European trade. They brought from Europe in their ships glassware, wines, clocks and woolens, but only a small quantity of such goods actually reached China. They were bartered in the ports of southeastern Asia for pepper, spices, sandalwood, precious stones, dyes, and other luxury items, articles for which a demand had existed in China for centuries and which could be exchanged for Chinese silks, porcelains, lacquerware and wood and ivory carvings.[11]

When Great Britain entered the trade in the seventeenth century, the British merchants were compelled to meet the requirements of a British law that not less than one tenth of the stock carried by ships from England must consist of goods grown, produced or manufactured in Great Britain. Until the middle of the eighteenth century, ships going to China had difficulty in disposing of anything in excess of that proportion.

[10] Kenneth S. Latourette, *The Chinese, Their History and Culture* (New York, 1934), vol. I, p. 356.

[11] Chang T'ien-Tse, *op. cit.*, p. 108.

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There was a demand for lead and tin, and woolen goods could be sold in small quantities.[12] Beyond those three items, most of the payment for Chinese goods was made in silver bullion or coin. In testimony given by officers of the East India Company before Parliamentary committees, it was brought out that the profits of the company in the China trade were made mainly in tea and that losses were incurred almost continuously on the goods sent from Great Britain to China.[13] American merchants made payments for tea and other Chinese goods mainly in ginseng, furs and silver.

The Emperor Ch'ien Lung expressed the Chinese attitude toward foreign trade in his often-quoted reply to George III of England, delivered to the Macartney Mission in 1793: "As your Ambassador can see for himself, we possess all things. I set no value on objects strange or ingenious, and have no use for your country's manufactures." [14]

Through most of the nineteenth century, this faith in things Chinese continued. The economic system, though it was by no means running smoothly, was not in danger of immediate breakdown. There were some Chinese who realized that reform was necessary, but to them reform meant the return to the virtues of some previous golden age—the Chou, the Han, the T'ang or the Sung. Only a few of the leaders believed that anything was to be gained from the foreigner, and it was they who were influential in the introduction of railways, factories, arsenals and shipyards.

The Influence of the Examination System

The hold of the past was strengthened and perpetuated by the educational system and particularly by the civil service

[12] Parliamentary Papers, House of Commons, 1821, vol. VII, *Minutes of Evidence (before Committee of Lords) Relative to the Trade with East Indies and China*, pp. 117-119; also Sir George T. Staunton, *Miscellaneous Notices Relating to China* (London, 1850), pp. 163-165.

[13] Parliamentary Papers, H. C., 1830, vol. V, *Report from the Select Committee on the Affairs of the East India Company*, p. 13, *Minutes of Evidence*, p. 66; Parliamentary Papers, H. C., 1821, vol. VII, *Minutes of Evidence*, pp. 117, 118, Appendix D.

[14] Translated in Sir Frederick Whyte, *China and Foreign Powers—An Historical Review of their Relations* (Oxford, 1927), p. 39, Appendix I.

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examinations. The examinations were established as early as the second century A. D., and they continued with practically no change in form through Chinese, Mongol and Manchu dynasties down to their abolition in 1905. Undoubtedly, they made many valuable contributions to the development of China. Government officials were selected presumably by merit and not by favor or family. The system was democratic, and it discouraged the growth of a permanent class or of caste distinctions. It perpetuated for the country, despite the many spoken dialects, a common written language, one of the strongest unifying forces of the present day, and it gave to China a cultural unity stronger and more persistent than has been any political unity.[15]

The emphasis in the examinations, however, was upon literature, and throughout the educational system attention was accordingly concentrated upon classical and historical writings. All wisdom was drawn from the words of the sages, and all conduct was governed by precepts of the past. Originality was not encouraged and even the form of expression was fixed, tending inevitably to sterility of thought. It was not until 1887 that science, and particularly mathematics, was included as an optional subject in the civil service examinations.[16]

The examination system held out the promise of position and honor to the youth of China, and it attracted the more ambitious. There was little encouragement of interest in scientific matters. The young man who did go abroad for study returned to face the barrier of an official class established by the old examination system. Though the returned students might be trained in Western learning, they did not have the literary and classical knowledge to enable them to pass the examinations. It is perhaps for that reason that so many of them became translators and mechanics and not administrators.

[15] Kenneth S. Latourette, "The Political Genius of the Chinese", in *China*, October 1934, vol. X, no. 2.

[16] Memorial of the Tsung-li Yamen upon the proposal for the introduction of mathematics and other Western sciences into the civil competitive examinations, provincial and metropolitan, translated in *North China Herald*, June 24, 1887, p. 698.

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Japan was probably not any less conservative than China at the time the country was opened, and there was a strong faith in things Japanese, but it was not so deeply rooted. There was no examination system, and class distinctions were important. At the top of the feudal hierarchy were the Samurai. They were the warriors, and they constituted an hereditary governing class which could not attract the ambitious youth of Japan in the same way that the official class drew the capable young Chinese through the more democratic examination system. With the restoration of the Japanese emperor to power in 1868, feudalism came to an end, and the Samurai were no longer a privileged and parasitic group. In their number were capable individuals who were forced to seek new occupations. The political leaders continued to be drawn very largely from the Samurai, and it was from the Samurai that most of the young men, in the earlier years, were selected to be sent abroad for Western training. They returned to administrative positions in which they played an important part in guiding Japan through the rapid political and economic changes of the last fifty years. Other Samurai, using the money paid to them by the government in 1874 and 1876 in capitalization of their hereditary pensions, became merchants, and still more turned to the new type of industries, becoming influential in introducing into Japan modern forms of manufacture. China has had no such class broken abruptly from its ties with the past.

Chinese Tariff Limitations

There have been other obstacles to the progress of industrialization. The economic organization of China, both as it stems from ancient usages and as it has developed through contact with the foreigner, has not encouraged the introduction of any new system of industry. New industries were faced from the beginning with the competition of a stream of manufactured products from the well-established industrial centers of the West. It was extremely difficult to compete either in price or quality with the commodities from Europe and America, and the pressure of the rapidly industrialized West to find a market for its surplus was undoubtedly a powerfu

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check on the modernization of Chinese industries. Other countries in the building up of new industries have been able to counteract the advantages of the older centers by resort to a protective tariff. For China, however, beginning with the Treaty of Nanking in 1842, the tariff had been fixed by agreement with the foreign powers, and in practice, for most of the period, duties on imports were limited to an average of 5 per cent ad valorem. It was not until 1929 that control of tariffs was restored to China. Not only were foreign goods admitted with a low tariff, but by the payment of an additional half-tariff, or 2½ per cent, they were exempted from the troublesome and numerous internal taxes during transit to their destination. Goods of Chinese origin did not enjoy such exemption. Following the same route, domestic commodities might be taxed at every likin station with a combined payment that gave a decided advantage to the foreign goods in the final market.

Some of the early manufacturing plants did not have even the preferential treatment afforded by the low tariff rate. For example, there is the case of the first cotton spinning and weaving mill established in Shanghai. Among its patrons was Li Hung-Chang, then Governor-General of Chihli Province, one of the small group of Chinese leaders who were taking a leading part in the opening of mines, the building of railways and the introduction of new industries. Though he undoubtedly appreciated fully the significance of the new venture, he stated in his reply to the organizer of the new company that "the cloth produced at the factory will be charged with a duty, when sold, equal to the import duty on foreign goods. . . . When it is sent up-country for consumption, it must pay, just as is the case with foreign piece goods, a half-duty besides, when a transit pass will be issued for it." [17] In establishing this tax and in putting the domestic cloth on the same footing as the foreign, as far as import duties were concerned, Li may have been moved by a desire for a new source of revenue. His

[17] Reply of Li, Governor-General of Chihli, to the petition by Pêng, an expectant Taotai, for permission to establish a cotton mill in Shanghai, translated in *North China Herald*, February 21, 1879, p. 176.

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explanation that the domestic cloth would "thus compete fairly with foreign cottons and there will be neither partiality nor wrong to anyone"[18] may reveal his true motive, though such economic chivalry seems most unusual. It is more probable that the stipulation was intended to obtain for the product of the new mill the same exemption from the likin taxes that was enjoyed by foreign cloth.

Transportation Difficulties

Obviously, the difficulties of inland communication in a huge territory, much of it remote from the sea, were a serious barrier to the development of manufacturing industries and of industrial centers. The necessary raw materials could be assembled only at considerable expense, and the market for any factory was limited very largely to the immediate locality.

In this respect, Japan possessed a very distinct advantage. Not only was the area of the Island Empire small, but most of the 30 million people lived on the coastal plains within easy reach of a coast line sufficiently indented to provide numerous harbors for small vessels. Coastwise traffic could connect most of the population centers. One of the first steps in the modernization of Japan was the building of railroads. A comparatively small mileage could serve the country effectively. Today, Japan has the best rail net in all of Asia, yet the total length is not quite 14,000 miles. China proper with 7,500 miles, a mileage a little greater than that of Japan at the outbreak of the World War, is very inadequately served. To obtain a rail density comparable to that of Japan, China must add to her present mileage a total of 135,000 miles of new construction.

The Hampering Effect of the Chinese Currency System

Chinese internal trade was hampered further by a cumbersome and disorganized currency system. During the last century, there has been no medium of exchange, with the exception of silver bullion, circulating freely and at a stable ratio throughout the country. Paper money was used in China a

[18] *Ibid.*

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least as early as the T'ang dynasty (618-906 A. D.). It was commented upon by Marco Polo and commended to the attention of the rulers of Europe in his account of China under the rule of the Great Khan. There was, however, as has always been the case in other countries, the temptation to issue the paper currency in too great quantity. Inflation was one of a number of factors contributing to the overthrow of the Yüan dynasty and the displacing of Mongol rule by Ming. In the centuries of contact with the foreigners, there has been little improvement in the currency. Further complications have been added with the circulation of the notes of foreign banks and of foreign-coined silver. The frequent periods of inflation, sometimes limited to individual provinces and sometimes more general, have interfered seriously with internal trade, thus supplementing poor means of communication in holding industrial production to the consuming capacity of a limited area.

As a metallic base in the currency system, China has used both copper and silver, and in foreign exchange transactions in more recent years, it is silver that has functioned. For most of the last sixty years, the period during which China might have industrialized, the price of silver in international markets in terms of gold has been declining. With the exception of the years of the World War, when there was a tremendous upswing, the trend has been downward from the level of $1.30 per ounce, that prevailed with only slight fluctuations for at least forty years before 1871, to about 28 cents in 1931 just prior to the abandonment of the gold standard by Great Britain and Japan. Though it is probably true that a falling price for silver would act as a protective tariff for China, discouraging imports from gold standard countries, it would be a general tariff, not in any sense selective, and would shut out all classes of goods. It must be remembered that during this period, if there was to be any modern development, the machinery for the new industries and much of the equipment for the railways had to be purchased abroad. As the price of silver in terms of gold went down, the cost to the Chinese not only of imported consumers' goods, but also of all the essential capital goods,

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mounted in the sense that each year, unless a corresponding rise in the domestic price level had occurred, the commodity equivalent of more silver had to be exported in exchange for a given number of locomotives or looms.

It is probable that imports of such items were discouraged by the fluctuations in silver, and that a heavy burden was placed upon the new industries. For example, a new cotton mill established at Woosung, near Shanghai, at the close of the World War, purchased equipment abroad on contracts that were made during the period when the price of silver was still unusually high and the foreign purchasing power of the Chinese dollar was accordingly high. By the time payment was due, however, the price of silver had fallen drastically. The mill was unable to meet its obligations and was forced to liquidate.

The unstable price of silver has introduced a speculative element into Chinese trade. With the fluctuations, there seemed to be much more immediate and more certain opportunity for profit through exchange operations in the import of consumers' goods—textiles, matches, clothing, flour, things that were capable of a rapid turnover—than there was in capital goods upon which the profit, if any, necessarily was indirect and spread over several years. Thus, the declining price of silver discouraged industrialization both in the added costs of equipment and in turning attention to the import of commodities that might have been made in Chinese factories.

The disturbing effects of silver have been demonstrated in the repercussions of the recent silver policy of the United States. Contrary to the benefits that were predicted so freely, the great rise in the price of silver resulting from the purchases by the American Treasury drew that metal out of the currency system of China and resulted in such a credit shortage that a number of the larger industrial enterprises of China were placed in a precarious financial position due to the heavy burden of their interest charges. China has finally been forced to abandon the silver standard. It would appear that neither a rising nor a declining price of silver can work to the general and long-term benefit of China. For economic development,

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stability of price is of prime importance. From the beginning, industrialization in Japan has had the advantage of a more stable monetary system, for gold became the basis soon after the opening of the country.

The Scarcity of Indigenous Capital in China

Another major obstacle to the introduction of modern enterprises, with their requirement of a large preliminary investment for plant and machinery, has been the shortage of industrial capital. It is a shortage that may be traced in part to the struggle for subsistence and in part to official discouragement of great fortunes among the merchants. Life in China for the great mass of the people has been too close to the margin to permit the accumulation of a surplus to be used as an agent of production at some later date. The basic occupation has been agriculture on a very small scale with a part of the population engaged in handicraft industries or in transport, always in small units. There has been no development of commerce and fishing, as there was in both England and New England, sufficient to accumulate indigenous capital in the hands of an investing public for the later building of the factory system.

In New England, beginning with the establishing of Samuel Slater's cotton mill in Pawtucket in 1790, capital that had been accumulated during the previous century in the fishing industry, lumbering, shipbuilding or the export and carrying trades was invested in the new factories of such centers as Lowell, Lawrence, Saco and Lynn. In New Bedford, the shift was even more direct. With the decline of the whaling industry following the drilling of the first petroleum well in Pennsylvania in 1859, the fortunes of New Bedford were turned into manufacturing and that city soon became the leading center in the United States for the spinning and weaving of cotton. The carrying trade of England, particularly of northwestern England, contributed capital to the growth of the textile and chemical industries of Lancashire and Cheshire.

There was some coastal shipping in China, but the Chinese were not expert mariners. From the earliest times they allowed the foreigners to control practically all of the overseas

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commerce. The staples of China's export trade, tea and silk, were carried by foreign shipping. The China Merchants Steam Navigation Company was organized in the nineteenth century for the purpose of breaking the hold of the foreigner on the inland waterways. The company has had only indifferent success. It has lacked capital, and there have been no profits to invest in other enterprises. The greater part of the traffic on Chinese rivers and along the Chinese coast still flies a foreign flag.

Internal trade, though limited by difficulties of transport, was probably much more extensive in China than is generally assumed. It did not serve, however, to build great fortunes, or if it did, those fortunes were not invested in large-scale enterprises which might attract the attention of a predatory officialdom. Foreign trade was no more effective in the development of Chinese manufacturing. It had always been limited and restricted by the government, and from the early eighteenth century it was the monopoly of the Cohong, a handful of merchants at Canton, who were answerable at all times to government officials. Although these merchants accumulated fortunes of magnitude, one of them being reputed to possess probably the largest mercantile fortune in the world,[19] the Cohong was restricted to thirteen members and they were constantly under financial exactions from provincial and national officials.[20]

The attitude of the government toward the merchants was in most respects antagonistic, for Chinese economic thought stemmed from the theories of the Legalists in the fourth century B. C., when commerce was held to be unimportant and merchants were regarded as a group to be obstructed in every way possible. The rise of a powerful merchant class was constantly held in check by the jealous literati of the official class, so much so, that at the end of the nineteenth century

[19] H. B. Morse, *The Trade and Administration of the Chinese Empire* (London, 1908), p. 281.

[20] William C. Hunter, *The "Fan Kwae" at Canton Before Treaty Days 1825-1844* (Shanghai, 1911), pp. 34-50; also H. B. Morse, *The Chronicles of the East India Company Trading to China* (Oxford, 1926), vol. IV, p. 173.

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Viceroy Chang Chih-Tung could state as a matter of common fact that Chinese merchants were not wealthy.[21]

Morse, in referring to the few great commercial fortunes that have existed in China, states that "they have invariably been made possible by the more or less direct connexion of the 'merchant' with the bureaucratic world." He adds that "in general, apart from the official circle, . . . China is a country of great individual poverty, and of small accumulation of capital."[22]

That the few wealthy Chinese merchants did not turn to manufacturing is explained perhaps by the fact that their attention was centered primarily on a trade, the staples for which were provided by the existing economic system of China. They held the current belief in the self-sufficiency of their country and in the adequacy of handicraft production. Also, the character of the early trade that flowed into Canton did not stimulate the development of manufacturing. Until the end of the eighteenth century, the commodities in this trade consisted very largely of the luxury articles of the old tribute trade—silver, jades, ivory, frankincense, perfumes, fine cloths and spices. In the first half of the nineteenth century, the Europeans added little to this trade. They used these same products, gathered along the route, with a few European products and a great deal of silver to buy their tea and silk. Later, they substituted opium and cotton from India for some of the silver, but the trade was essentially a luxury trade. Only cotton, of all the imports, could be used as a basis for the development of large-scale industry, but the first and only cotton mill of south China was set up with foreign capital, and it soon failed.[23]

By way of contrast, New England in a somewhat similar period, in exchange for lumber and fish, brought into her ports sugar, cotton, crude rubber, hides and other articles that demanded either further trading or manufacture. Similarly, ships that left Liverpool at the end of the eighteenth century,

[21] Chang Chih-Tung, *op. cit.*, p. 56.

[22] H. B. Morse, *The Gilds of China* (London, 1909), p. 4.

[23] Records of the Registrar of Companies, Hongkong.

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in what is known as the Great Triangle trade, carried beads, cheap manufactures, gunpowder, raw spirits and cheap guns to Africa to exchange for slaves; took the slaves to the West Indies and traded them for molasses, tobacco and cotton, and then brought those raw materials back to England for manufacture.

In Japan, an antagonistic attitude toward merchants and commerce, similar to that prevailing in China, was evident, particularly in the more northern sections of Honshu where agriculture was almost the sole occupation. Along the southern coasts, however, where there was some foreign trade, even though it was a clandestine trade, economic thought was more liberal, and the merchant was tolerated. Furthermore, shoguns and daimyos found merchant-bankers very useful, and they were honored rather than despised. Forced loans were made from this class but they were not taxed too heavily on their wealth. These merchant-bankers were instrumental in restoring the emperor to power and were eagerly used by the government in its program of industrialization as partners in the enterprise.[24] Private wealth was supplemented with government subsidies and other forms of government aid and encouragement.[25]

In India, in the face of a somewhat similar shortage of capital, the necessary funds for jute mills, coal mines and tea estates were found, not at home, but in England through the British managing agency system. Some capital for cotton mills was obtained in India but only through the system introduced by the British.[26] China, on the other hand, feared foreign capital, and the government failed to pursue any consistent course either of direct participation or of the encouragement of private enterprise in the new industries. It was

[24] *The House of Mitsui, A Record of Three Centuries, Past History and Present Enterprises*, Mitsui Gomei Kaisha (Tokyo, 1933), pp. 14-16; *The Mitsui Bank, A Brief History, Jubilee Commemoration, 1926*, Mitsui Bank Ltd. (Tokyo, 1926), pp. 1-17; *An Outline of the Mitsubishi Enterprises, 1935*, Mitsubishi Goshi Kaisha (Tokyo, 1935), pp. 1-2, 7, 31.

[25] John E. Orchard, *Japan's Economic Position* (New York, 1930), pp. 89-110.

[26] P. S. Lokanathan, *Industrial Organization in India* (London, 1935), pp. 15-24.

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not seeking to Westernize industry, and its officials were indifferent, if not hostile, to the development of new enterprises.

Even in the cases where the Chinese government did give encouragement to new industries or new means of communication, the merchants who possessed an accumulation of capital were slow to come forward with their support. The Imperial Edict of December 7, 1895 gave permission to the rich merchants of the provinces concerned to form a company for the construction of the Peking-Hankow Railway,[27] but in 1898 the Director General of Railways, Shêng Kung-Pao, in answering a charge of dilatoriness in the building of the railway, observed that the Chinese merchants would not take shares in the railway until it was finished and they could see their way to profit.[28] Shêng had had similar experiences in his management of the telegraphs and of the China Merchants Steam Navigation Company. It was because of the failure of the merchants to subscribe the necessary funds for the completion of the Peking-Hankow line that a loan was negotiated with a Belgian company. There are numerous other examples of the failure of Chinese capitalists to come to the support of a railroad program and of the necessity of resorting to foreign loans.

Further evidence of a shortage of capital is to be found in the consistent record of failure that has attended Chinese efforts throughout the modern period of industrialization. Too often there has been insufficient capital to operate a plant after its construction and the purchase of machinery. Numerous cotton mills and flour mills have reverted wholly or in part to the foreign importers, because the Chinese owners have been unable to meet payments on equipment. One large American distributor of machinery, in 1932, was operating no less than four cotton mills, and a number of other kinds of mills, for which the equipment had been supplied and against which there were outstanding delinquent payments. Several cotton mills, both in Tientsin and in Shanghai, have come under Japanese control because of the financial difficulties of the

[27] China, Maritime Customs, *Decennial Reports, 1892-1901* (Shanghai), p. 590.

[28] Translated in the *North China Herald*, September 19, 1898, p. 517.

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original Chinese owners. Nanyang Brothers Tobacco Co., Ltd., a large Chinese concern established in 1906, had exhausted its capital within a year after the opening and was forced to close its plant for a time until further financial arrangements could be made. The number of foreign flags flying over Chinese mills for protection at the time of the Japanese invasion of Shanghai in 1932 was mute evidence of the extent to which Chinese-owned industry was mortgaged to foreign interests.

Many mills, because of too limited capital, have been organized on a scale too small for economical operation. Paper mills generally cannot produce efficiently or cheaply with only one machine. Cotton mills of less than 20,000 spindles are questionable units. Cement mills of but one kiln may not be economical. Nevertheless, because there was insufficient capital for the larger and more efficient establishments, such small units have not been uncommon in China.[29]

The comparatively few large-scale plants have been established not with capital obtained from a numerous investing public but with funds provided by governmental agencies, or by foreign investors, or by a few outstanding Chinese individuals or families. Most of the government enterprises, provincial or national—such as the iron works in Hupei, numerous arsenals, shipyards, cement mills and others—have experienced financial difficulties. The foreign mills, mines, railways and shipping concerns have not lacked capital, and their record has been better, on the whole, than that of the Chinese, though there have been political difficulties and other opposition.

The private Chinese enterprises, mainly cotton mills, flour mills, tobacco factories, paper mills, cement plants and salt works, have from the beginning suffered from the absence of a well-developed capital market. Most of them are the property of a single wealthy individual or family, and in an emergency, when personal resources are inadequate and it is necessary to seek borrowed funds, interest rates have been high and often ruinous. Only recently, perhaps the largest and the most

[29] This judgment is based on the author's personal investigation of some 450 Chinese industrial establishments.

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successful of this small class of Chinese manufacturers faced the loss of one of his Shanghai cotton mills because he could not meet the loans he had contracted on the plant. The sale of the mill to Japanese interests was prevented only by the concerted action of the Chinese government and the Chinese bankers of Shanghai.[30]

Chinese Legal Concepts and the Corporation

The reluctance of the Chinese public to invest in the new enterprises may be explained in part by the conservative questioning of things quite alien to them and to their culture. It may be explained also by legal concepts that did not comprehend the corporation, the organization so important in the West in the assembling of large units of industrial capital. Chinese law was mainly public law dealing with crime and with punishment. "Even as late as the 19th century, the Chinese had not developed any true system of private law. A large sphere of regulation was left to the family. To the gilds was left the settlement of commercial disputes."[31] Chinese business honesty is proverbial, but it is a decidedly personal morality based upon contacts and agreements between individuals. The entire credit and banking structure has rested upon personal rather than institutional relationships. There has been an unwillingness to entrust funds to a corporation where the relationship between the investor and the management is quite impersonal. There may have been the fear that into such a relationship there would be introduced some of the corruption that characterized government in China, whether local or central. Whatever the reason, it is true that there has been no great development of the corporation. It is also true that because of their reputation for inefficiency and corruption there has been a particular distrust of any enterprise in which government officials have had a hand, an attitude toward government in business by no means confined to China.

The system of taxation and official greed discouraged any open display of surplus capital. The tax system, even in the

[30] *North China Herald*, March 6, 15 and 28, 1935.

[31] Jean Escarra, "Chinese Law", in the *Encyclopedia of the Social Sciences*, vol. 9, pp. 248-254.

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nineteenth century, retained the old philosophy of the Legalists that trade and merchants were non-essentials to be obstructed by heavy exactions. Wealth was regarded as something that could be levied upon to the limit of its capacity to pay. Experience had taught the Chinese that any step which tended to bring their monetary affairs to the attention of their mandarins was unwise. They were reluctant to subscribe to any new enterprise, such as a mining company or a railway, because they feared that their subscription would be taken as a measure of their capacity to contribute to official coffers. An editorial writer in an English language journal in Shanghai stated in 1876 that

> there is much private capital in China seeking an outlet; but all outlet is denied it by the fear that when the undertaking to which it is intended to be applied is got into working order, the myrmidons of government, or rather of the taxing class, will pounce down upon it, to the probable ruin, and certain loss, of its promoters.[32]

He goes on to point out that elsewhere than in China the Chinese are active in transport and in manufacture.

The same distrust of the official acted as a barrier to the full employment of the new means of transport. A merchant of Chinkiang in 1878 explained the reluctance to make use of the facilities of the newly organized China Merchants Steam Navigation Company by stating that the mandarins would mark down the largest shippers as fit objects for squeeze.[33]

Chinese Opposition to Foreign Capital

Not only were the Chinese backward in providing capital, but they were strongly opposed to the investment of funds by foreigners. This opposition was particularly evident in the building of railways, since they were regarded with suspicion as instruments of foreign penetration. Shêng Kung-Pao found it necessary to raise the funds for the construction of the Peking-Hankow Railway by means of a foreign loan.[34] On

[32] *North China Herald*, September 23, 1876, p. 267.

[33] *Ibid.*, April 11, 1878.

[34] *Ibid.*, Sept. 19, 1898, p. 517.

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another occasion, he was taken to task in an imperial decree for a loan that he had negotiated with a German concern, on security of certain property of the China Merchants Steam Navigation Company, for the purpose of installing additional machinery and extending the railway at the important P'inghsiang Colliery in Kiangsi Province. Shêng was defended by the Viceroy, Chang Chih-Tung, who pointed out the necessity of the development at P'inghsiang and who also commented that it would be a poor policy to wait for the money that could be expected to come in by driblets through the purchase of shares in the company by Chinese merchants and men of wealth.[35]

A few years later, in 1905, Chang Chih-Tung borrowed £1,350,000 from the Hongkong government to enable him to redeem the Canton-Hankow Railway concession from the American China Development Company, when it appeared that the necessary funds were not forthcoming from the wealthy Hunanese gentry who had loudly demanded the redemption for patriotic reasons at the time of the anti-American boycott, but who were not willing to risk their own fortunes. Thus forced to make another foreign loan, Chang Chih-Tung was severely critized in government circles and was ordered by the Department of Commerce to repay the loan as speedily as possible and to refrain from contracting other loans.[36] Work on the railway proceeded slowly and was halted in 1918 with the middle section of some 280 miles still not built. Construction was resumed in 1929, and completion was made possible not by private funds but by the return to the Chinese government of the British share of the Boxer indemnity. The final section was finished in April 1936, and through traffic from Canton to Wuchang, opposite Hankow, is now possible thirty-four years after the beginning of construction.

One of the most striking illustrations of the opposition to foreign capital is provided by the Pao Chin Company of Shansi Province. In 1898, the governor of the province granted a

[35] *North China Herald*, Nov. 27, 1899, p. 1086.

[36] Percy H. Kent, *Railway Enterprise in China* (London, 1908), pp. 119-120; and *The Japan Times*, Tokyo, October 14, 1905, p. 49.

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concession for a period of sixty years to an Anglo-Italian concern for the development of the minerals of four specified areas. Elaborate plans were made by the foreign concern for the opening of mines, the construction of an iron plant and the building of railways. The people of the province, however, were bitterly opposed to the concession, and finally in 1904 the gentry succeeded in organizing the Pao Chin Kung-Szu—literally the company for the preservation of Shansi. Sufficient capital was raised to buy out the Anglo-Italian concern and terminate the concession,[37] but to the present day very little has been accomplished by the Chinese company in the development of the resources of Shansi.

The Restrictions of the Chinese Gilds

Finally, the very structure of the economic system discouraged any new developments. Handicraft industries, merchants and bankers were all organized into gilds, their origin going back for centuries. Quite independent of the government, they exercised almost complete control over the conduct of their members. To enforce their rule there was no recourse to courts or to law. Their decisions were upheld by the power of mass action against the individual. Any craftsman or merchant who failed to carry out his gild obligation might become economically ostracized. It is this mass action for economic purposes that may be considered as more or less the root of the economic boycott for political reasons so important in recent years.

The power of the gild created a rigidly established economic order. Prices were fixed, and members who sold for a higher or a lower price were severely disciplined. Interest charges were determined not by the individual banker but by his gild. There were very specific rules for the marketing of commodities. In the handicrafts, the number of apprentices was sometimes limited. Thus, both through price fixing and through checks on the number of workers, there was a limitation of output. All of these restrictions were accepted as a matter of course by the Chinese, accustomed to group control, but

[37] Personal interview of the author with officers of the Pao Chin Company.

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they are not so easily understood by the individualistic Westerners. The Western viewpoint is expressed by Morse in his statement that "all Chinese trade gilds are alike in interfering with every detail of business and demanding complete solidarity of interest in their members. . . . The result is a tyranny of the many over the individual and a system of control which must by its nature hinder freedom of enterprise and independence of individual initiative." [38] Whether or not so extreme a view is accepted, the gild did give a certain degree of rigidity to the Chinese economic system, and individual enterprise that might have played a major part in the bringing in of new industries was hampered. To the present day, there are gilds that enforce restrictions upon the introduction of machinery.

Political Instability of China

More important in obstructing industrialization than the prejudice and superstition of the Chinese masses, and probably equally as important as the rigidity of the economic system, has been the political instability of China during the nineteenth and twentieth centuries. With the succession of mediocre rulers that followed K'ang Hsi and Ch'ien Lung, the two great Manchu emperors of the seventeenth and eighteenth centuries, central authority gradually weakened. Rebellions, the most important of which were the Moslem rebellions of the northwest and Yünnan and the T'aip'ing Rebellion extending from 1848 to 1865, threatened to drive out the Manchus, but they were kept in power for a few years longer by the strength of the reactionary Empress Dowager, Tz'u Hsi, and it was not until 1912 that the dynasty gave way to the Republic.

It was during the closing century of the Manchu rule that the foreign powers were able to make inroads upon China's sovereignty, very largely because of the weakness of the government. But such encroachments served to weaken the dynasty still further and to hasten its collapse. Though the threat of the foreigner did stimulate some recourse to modernization as a method of defense, particularly in the building of

[38] *The Gilds of China*, p. 28.

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arsenals and shipyards, the ruling group was too inept to take any really effective steps and always there was the steadfast opposition of the Empress Dowager to any change. In the long run, political disintegration rather than economic regeneration has resulted.

For many years, the complete breakdown of all central authority has been imminent. The Earl of Macartney, first British ambassador to China, wrote in his diary under date of January 2 to January 7, 1704:

> The Empire of China is an old, crazy, first-rate man-of-war, which a fortunate succession of able and vigilant officers have continued to keep afloat for three hundred and fifty years past, and to overawe their neighbors merely by her bulk and appearance. But whenever an insufficient man happens to have the command on deck, adieu to the discipline and safety of the ship. She may, perhaps, not sink outright; she may drift some time as a wreck, and will then be dashed to pieces on the shore, but she can never be rebuilt on the old bottom.[39]

During the decades from 1870 to 1900, there appeared in the English language press in China frequent editorials predicting the collapse within a very short time of all national authority.[40] With a change only of date and personalities the editorials could easily be substituted for those that have appeared repeatedly in the foreign language press of Shanghai in the disturbed years of the Republic, especially in the last decade, reflecting the attitude of the foreign business man impatient with the disorders that are to him only an obstacle to profitable trade and not the natural phenomena of a people in political revolution. Though he is perhaps unnecessarily pessimistic concerning the future of China, the business man does portray the precarious hold that has characterized the Chinese government for the last century. There has been little opportunity

[39] Helen H. Robbins, *Our First Ambassador to China: An Account of the Life of George, Earl of Macartney, with extracts from his letters and the narrative of his experiences in China, as told by himself, 1737-1806* (London, 1908), p. 386.

[40] See particularly *North China Herald*, May 4, 1878; April 29, 1879; February 27, 1891; October 16, 1896.

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for the leaders to give major attention to the many problems of a changing economic order.

The present is by no means the first period of political disorganization in Chinese history. With each change of dynasty, there have been civil wars and the collapse for a time of central authority. The area of China is so vast, and the means of communication have been so limited, that only a strong hand has been able to maintain any semblance of unity. China includes numerous nuclei of population, each isolated from the others by topography and by distance, and each possessing its own economic identity, its own leaders and its own political ambitions.[41] With any weakening of the ruling dynasty, the conflict of regions and economies, north against south, coast against interior, nomad against sedentary agriculturist, has inevitably followed until some area or faction has emerged victorious to rule until it in turn is displaced.[42] Under the circumstances, the wonder is not that China has had so much political disturbance but that any national identity remains. On the continent of Europe, an area somewhat similar in extent has been divided into many nations and many cultures. There is reasonable doubt whether the United States could have survived as one nation within its present boundaries without the unifying force of the railroad soon after the movement of settlement west of the Appalachians began.

In political instability, China has differed markedly from the other countries that have entered upon the development of a modern industrial system. All have experienced opposition by labor to the introduction of machinery, superstition and prejudice directed against new inventions, difficulties in assembling capital for large-scale enterprises, but the three most conspicuous industrial countries of the West, Great Britain, Germany and the United States, have all had one great advantage over China, and that has been the enjoyment of long periods of

[41] Percy M. Roxby, "The Distribution of Population in China: Economic and Political Significance", *Geographical Review*, vol. XV, no. 1, January 1925, pp. 1-24.

[42] For a full discussion of this point see Chi Ch'ao-Ting, *Key Economic Areas in Chinese History* (London, 1936).

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internal order with a strong, unchallenged central government. Great Britain has known political stability for several centuries, the United States since the Civil War and Germany since 1871.

A comparison with Japan is even more pertinent. At the opening of the country in the middle of the nineteenth century, Japan experienced what might be termed a political revolution in the displacing of the shogun and the restoration of the emperor to power and in the adoption of many governmental forms patterned after the West. In the restoration of actual authority to the nominal head of the state, however, there was no disturbance of the centralized government, the building of which had been begun by the Kamikura and Ashikaga shoguns and completed in the late sixteenth and the early seventeenth centuries by Nobunaga and Hideyoshi and by Iyeyasu, the first of the Tokugawa shoguns. Almost immediately after the restoration of the emperor, compact Japan with a small area, a homogeneous population and a respect for central authority was prepared to proceed with a minimum of political distraction to the task of economic revolution. In China, on the other hand, vast in area, poorly equipped with means of communication to hold the different sections together, with people of many dialects, the impact of a new industrial order has coincided with the decline and fall of a dynasty. The country has undertaken, *though not voluntarily, the tremendous tasks of political integration* and economic revolution simultaneously, and all this in the face of the political and economic ambitions and encroachments of a whole horde of strong, imperialistic nations.

Possible Acceleration in Industrialization

On the surface, there are many obstacles to any acceleration in the rate of industrialization in China. There is still political chaos and to all the other handicaps have been added the encroachments of Japan, more rapid and more ambitious than have been the encroachments of any Western power. Japanese penetration may possibly extend eventually to the virtual destruction of Chinese sovereignty and to the reduction of a large part of the country to a political status similar to that of Manchuria. In such an event, stimulation to industrialization may

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occur through the invasion of Japanese capital and the building of factory industries in China under Japanese auspices, despite the present conviction of a considerable body of opinion in Japan that such a development would conflict with the interest of the already established Japanese domestic industrial enterprises.

On the other hand, adversity may have its virtues. The shock of this latest penetration by Japan has almost completed the disillusionment begun by the Japanese victory in the war of 1894-1895. The weakness of the country is generally recognized. The old faith in the superiority of Chinese institutions and Chinese methods has been severely shaken, not only on the coast but far into the interior. There is a growing interest in industrialization and there is a visible turn to mechanization and modernization as possible solutions of China's present predicament. Under the leadership of Chiang Kai-Shek and with the aid of more modern methods of communication, China proper enjoys today probably a greater degree of political unity than has existed at any time since the fall of the Manchu dynasty.

Chinese mineral resources are being studied much more intensively by the Geological Survey, and mines are being opened under Chinese control. A national economic council is drawing up an elaborate and comprehensive program for manufacturing plants, highways, railroads, waterways, harbors and power plants. Plans have been made for a large iron and steel plant. Sugar mills, paper mills, cement mills, industrial alcohol plants have been built or projected by national or provincial governments or by private interests, particularly in south China. Government inspection bureaus are endeavoring to raise the standard of quality of Chinese export staples, such as tea, silk and wood oil.

More significant than anything else has been the improvement of communication facilities. Thousands of miles of highways are being constructed, often with forced labor, and along the completed highways lines of motor busses are operating. Airways make accessible, in hours, areas formerly reached only in days of travel. Railway construction is more active than at

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any time since the World War, and plans have been made which, if carried out, will link together the outlying parts of the country.

The handicap of the scarcity of capital has been appreciated and in recent months the China Development Finance Corporation, in reality an investment bank, has been organized in Shanghai. It has government support and leading government officials were active in its formation, but control is in the hands of private interests, mainly the private banks of China. It will provide the capital for large-scale enterprises from Chinese sources if possible, or, if foreign borrowing is necessary, it will be done through the Finance Corporation.

More interest in industrialization on the part of the Chinese leaders and the Chinese people is manifested at present than ever before, a change in viewpoint that reflects the collapse of the old economic order and perhaps foreshadows far-reaching industrial development.

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CRIMINAL CONSPIRACY AND EARLY LABOR COMBINATIONS IN NEW YORK

WHEN trade unionism first raised serious issues for American industry at the beginning of the nineteenth century, the courts, governed by ill-digested laissez-faire theories, turned for precedents to English labor law. Precedents which satisfied the judiciary were uncovered in the medieval urban economy and under the national economy of mercantilism. At first glance it may seem an historical paradox that systems of economic thought so opposed on certain fundamentals as were mercantilism and early laissez faire should in actual practice be in such close agreement on the question of labor combinations. For Adam Smith and Malthus were keenly desirous of raising the living standards of the working class; the mercantilists, on the other hand, were convinced that a low subsistence wage for labor was necessary for the prosperity of the state. Nevertheless, the two most effective principles ever used for the control of labor—the doctrine of criminal conspiracy and the doctrine of restraint of trade—were raised under a mercantilist economy and, transplanted to early laissez-faire soil, flourished in England as the green bay tree. The mercantilists consecrated the state; the advocates of laissez faire, the individual. In neither philosophy was there room for an aggressive labor movement.

However appropriate these historical generalizations may be to England in the eighteenth century, they need to be carefully tested in their application to the British colonies in North America, where the worker generally enjoyed more favorable economic conditions than in the mother country. The early labor history of the province and state of New York, for example, provides numerous illustrations, little known, of the treatment of labor and producer combinations during the period of transition from the one dominant economic philosophy to the other. Under mercantilism English labor controls were

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enforced in the province with little consistency, and under the early laissez faire of the mid-eighteenth century it can scarcely be said that the judicial practices of England in labor matters had taken firm root. The seed was sown, but the shoots were not easily discernible until after the War of Independence.

People v. Melvin and common law conspiracy

Beginning with the Napoleonic Wars and the period of consequent industrial expansion in America, a series of decisions by American courts dealing with trade unions effectually curtailed such combinations under the old common law of criminal conspiracy.[1] In New York the issue was first raised in the *New York Cordwainers' Case,* 1809-1810 (reported as *People v. Melvin*)[2] when activities of workers in concert were attacked in the Court of General Sessions.[3] In none of the early cases were the issues, historical as well as socio-economic, expounded with greater erudition or vigor. The prosecution was the result of a "strike" of the shoemakers against a master who had employed a nonunion apprentice and then attempted to get his work done in other shops, upon which the union called a "general" strike in the trade. The court, Mayor Ratcliffe handing down the opinion, held that the refusal of the defendants to work with non-members was coercive, and therefore unlawful, because it was concerted action of a number of persons. The defendants were fined one dollar and costs. While the decision became the mainstay of labor prosecutions it was more moderate in tone than the earlier case of the Phila-

[1] The first of this series was the Philadelphia Cordwainers' Case, 1806, for which the reader is referred to the illuminating analysis by Walter Nelles "The First American Labor Case", *Yale Law Journal,* XLI (1931), 165. For the report of this case, see *Trial of the Boot and Shoemakers of Philadelphia* (Philadelphia, 1806); John R. Commons *et al.*, (eds.), *A Documentary History of American Industrial Society* (Cleveland, 1910), III, 59, 233.

[2] Reported in condensed form in 2 Wheeler Cr. Cas. 262 (N. Y., 1810), and more extensively by William Sampson, an attorney for the defense, in a pamphlet, entitled *Trial of the Journeymen Cordwainers of the City of New York for a Conspiracy to Raise Their Wages* (New York, 1810), reprinted in Commons *et al., op. cit.,* III, 251. See also Minutes of the Court of General Sessions 1810, pp. 210-215, Criminal Courts Bldg.

[3] This was the old colonial criminal court, presided over by the mayor, which reopened at the close of the Revolution.

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delphia Cordwainers (1806), for the court, by way of dictum, differentiated between the means used to accomplish an end and the end itself, thus foreshadowing, if somewhat remotely, the results reached in a later line of cases which may be considered to stem from *Commonwealth v. Hunt* (1840)[4] where the purpose or motive of the trade union was held to be controlling. Opposing counsel analyzed the concept of criminal conspiracy at common law with arguments drawn principally from English legal history, but in small part also from the earlier experience of New York City. The prosecution, led by the brilliant and talented Thomas Addis Emmet, exhumed an impressive array of English precedents, then little known, but soon to be considered landmarks of labor law. Counsel for the defense, Cadwallader D. Colden, subsequently mayor of the city, and William Sampson, denied the pertinence of these precedents and vigorously opposed applying the common law system to American cases. The references to English antiquities caused Sampson to declaim: "When is it, that in search of a rule for our conduct, we shall no longer be bandied from Coke to Croke, from Plowden to the Year Books, from thence to the dome books, from *ignotum* to *ignotius,* in the inverse ratio of philosophy and reason. . . . How long shall this superstitious idolatry endure?"[5] Nevertheless the defense likewise delved into old records; Sampson especially resorted to historical arguments which a leading authority has called "penetrating as well as monumental."[6]

[4] For a discussion of this case, see Walter Nelles, "Commonwealth v. Hunt", *Columbia Law Review*, XXXII, 1128-1169, and for a list of American labor cases preceding the Hunt case, see *ibid.*, pp. 1166-1169. See also Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York, 1930), pp. 2 *et seq.*; W. Purrington, "The Tubwomen v. The Brewers of London", *Columbia Law Review*, III, 453-457; George H. Jaffin, "Theorems in Anglo-American Labor Law", *ibid.*, XXXI, 1104-1134.

[5] *Trial of the Journeymen Cordwainers*, pp. 45, 46.

[6] Nelles, *Columbia Law Review*, XXXII, 1166 n. Perhaps the quondam Dublin barrister shines more brilliantly than his distinguished colleague because Colden's rebuttal was not published by the reporter (Sampson), who accidentally mislaid it and destroyed his transcribed notes. *Trial of the Journeymen Cordwainers*, p. 141. Sampson was, however, a pioneer in America in advocating law reform, codification, and a break with the common law. His most widely publicized statement was *An Anniversary Discourse delivered*

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In denying that the crime of conspiracy at common law embraced the acts of workers in concert, Colden and Sampson raised issues which were soon to be vital to the very continuance of the trade-union movement both in England and America. In 1824 Parliament repealed the sweeping Combination Act of 1800,[7] but the very next year a statute was passed which, while repealing the statutory penalties against labor combinations, left conspiracies to commit any of the acts prohibited to be dealt with at common law. According to the judicial opinion which prevailed after the enactment of this statute, conspiracies in restraint of trade were offences at common law apart from the enactments referred to in the act of 1825—a view in accord with *People v. Melvin*.[8] Likewise in New York, when an indictment was brought under a provision of the New York Revised Statutes of 1829, including among criminal conspiracies "conspiracy to injure trade or commerce", the court considered the statute as continuing the common law crime, not as creating a new one.[9]

The weight of scholarly opinion on this subject, however, does not support the view of the early nineteenth-century English and American courts, but holds that the extension of criminal conspiracy to include acts in restraint of trade actually began in the Court of Star Chamber early in the seventeenth century; such jurisdiction was claimed and ultimately absorbed

before the Historical Society of New York . . . December 6, 1823 showing the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law (New York, 1824), reprinted in *Sampson's Discourse upon the History of the Law*, comp. by P. Thompson (Washington City, 1826), which also contains (pp. 131-150) an extract of his defense of the journeymen cordwainers. His writings possess a verve, wit and emotional quality unusual for the day and subject.

[7] 40 Geo. III, c. 106.

[8] Stats. 5 Geo. IV, c. 95; 6 Geo. IV, c. 129; G. Howell, *Labour Legislation, Labour Movements, and Labour Leaders* (London, 1902), p. 57; Sir James Stephen, *History of the Criminal Law of England* (London, 1883), III, 210, 211, 218, 219, 223, 224. See *contra* A. V. Dicey, *Law and Public Opinion in England* (London, 1905), pp. 190-200; Sir William Erle, *The Law relating to Trade Unions* (London, 1869), p. 58.

[9] People *v.* Fisher, 14 Wend. (N. Y.) 2(1835). It should be noted that the earlier New York statute of 1801 dealing with criminal conspiracy did not go beyond acts to obstruct or defeat justice. Laws of New York, 24 sess., c. 87.

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by King's Bench. Up to that time, apart from the Statute of Laborers and the subsequent line of labor statutes, the only conspiracies known to the law or commonly treated as crimes were conspiracies to prevent, obstruct or defeat the course of justice, or by officials to defeat or delay justice or to extort under color of office. Even such conspiracies were statutory in origin and unknown to the early common law.[10] The inclusion by the later courts of labor combinations as conspiracies at common law can be traced to an ambiguous statement of Hawkins, in his *Pleas of the Crown,* published in 1716, to this effect: "There can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person are highly criminal at common law."[11] This bare statement, founded on precedents of dubious value, was widely copied.[12] Within a

[10] Maitland points out that Coke's view that even before the Edwardian statutes the writ of conspiracy was already in existence is based upon the fables of the *Mirror of Justice.* Sir Frederick Pollock and F. W. Maitland, *The History of English Law* (Cambridge, 1923), II, 539 n. See also Percy H. Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (Cambridge, 1921), p. 37; R. S. Wright, *The Law of Criminal Conspiracies and Agreements* (Philadelphia, 1887), p. 5; Stephen, *op. cit.*, III, 209, 210; F. B. Sayre, "Criminal Conspiracy", *Harvard Law Review,* XXXV, 395, 400 *et seq.;* David Harrison, *Conspiracy as a Crime and as a Tort in English Law* (London, 1924), p. 10.

The process of analogical extension began with the Poulterers' Case, 9 Co. Rep. 55b; Moore, 814 (1611), where a mere agreement or act of combination, not followed by acts in furtherance of its object—in this case to indict falsely—was punished criminally. In Rex *v.* Starling, 1 Sid. 174; 1 Keb. 650, 655 (1665), the defendants were convicted for conspiring to interfere with the farming of the public revenue. Here was an offense, as Holt pointed out, which was directly leveled at the government. Reg. *v.* Daniell, 6 Mod. 99, 100 (1703). From this, by analogy, combinations directed against the public welfare were later prosecuted.

[11] W. Hawkins, *A Treatise of the Pleas of the Crown* (1st ed., London, 1716), bk. i, c. 72. For the authorities in support of this statement, see Sayre, *loc. cit.*, pp. 402, 403.

[12] Richard Burn, *The Justice of the Peace* (4th ed., London, 1755), p. 276; Matthew Bacon, *Abridgment* (London, 1832), IV, 409; J. Chitty, *A Practical Treatise on the Criminal Law* (1st ed., London, 1816), III, 1139. In America it was adopted by James Wilson (*Works* [Philadelphia, 1804], III, 118), but it is interesting to note that Z. Swift, in his *A System of the Laws of the State of Connecticut,* published in 1796, considered conspiracy merely "as a combination to indict or procure to be prosecuted an innocent man falsely and maliciously, and who is accordingly indicted, and acquitted" (II, 356).

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few years it was reinforced by the decision in *Rex v. Journeymen Tailors*,[13] where certain workers were indicted and found guilty of a conspiracy to raise their wages. While it is true that in the preceding year a statute had been passed in England which expressly made it criminal for journeymen tailors to enter into any agreement "for advancing their Wages or for lessening their usual Hours of Work",[14] and the defendants' conduct would have been criminal quite apart from any conspiracy doctrine,[15] nevertheless the indictment was not based upon any statute but lay at common law, and the court, however erroneously, decided, according to the available report, that the indictment need not conclude "*contra formam statuti*" because conspiracy was a common law offense. This broadly-stated proposition of the court, quite unsupported on historic grounds, was followed in later decisions.

Whether or not the common law did consider a combination of workers to raise wages a criminal act, there is no question that under such basic labor laws as the Statute of Laborers of 1349 and the Tudor Statute of Artificers such action was regarded as criminal and seditious.[16] The mercantilists looked with approval upon the Tudor labor code, favored compulsory labor as a solution of the problems of poverty and vagrancy, and advocated low wages as a preventive of poverty and vice and as insuring a favorable balance of trade.[17] While journeymen

[13] 8 Mod. 10 (1721).

[14] 7 Geo. I, c. 13 (1720).

[15] Sayre's view, *loc. cit.*, pp. 402, 403. See also Wright, *op. cit.*, p. 53.

[16] Among the early statutes the principal ones were: 23 Edw. III (1349); 2 & 3 Edw. VI, c. 15 (1549), which, though aimed primarily at combinations to keep up prices charged to consumers, includes within its prohibitions any combinations of journeymen craftsmen to keep up wages or reduce hours. According to the Webbs, as early as 1383 the Corporation of the City of London prohibited all "congregations, covins, and conspiracies of workmen": Sidney and Beatrice Webb, *The History of Trade Unionism* (rev. ed., London, 1920), pp. 2-6.

[17] Eli Heckscher, *Mercantilism* (London, 1935), II, 152, 297-301; Edgar S. Furniss, *The Position of the Laborer in a System of Nationalism* (Boston, 1920), chs. 6, 7; Witt Bowden, *Industrial Society in England towards the End of the Eighteenth Century* (New York, 1925), pp. 231-233; W. Hasbach, *History of the English Agricultural Laborer* (London, 1908), p. 100 n.

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combinations can be traced as far back as the fourteenth and fifteenth centuries,[18] the more aggressive and permanent forms of labor combinations seem to have arisen in the middle and latter part of the seventeenth century, and to have expanded rapidly within a few years after the Revolution of 1688.[19] To crush this movement a series of acts was passed in the eighteenth century outlawing such labor combinations in particular crafts.[20] Where workers opposed the scale of wages fixed by the justices of the peace, they were prosecuted for mutiny, riot, or criminal conspiracy. Many such prosecutions could be culled from the local court records of Hogarthian England, indicating an impressive amount of labor unrest.[21]

[18] George Unwin, *Industrial Organization in the Sixteenth and Seventeenth Centuries* (Oxford, 1904), pp. 120, 121 *et seq.*; E. Lipson, *The Economic History of England* (London, 1931), I, 356 *et seq.*; III, 386-392.

[19] Such groups as the colliers, clothworkers and carpenters were in the advance guard. Early eighteenth-century groups include the wool-combers, framework knitters, and journeymen tailors. J. U. Nef, *The Rise of the British Coal Industry* (London, 1932), II, 178; Unwin, *op. cit.*, pp. 199, 200, 212, 213; Lipson, *op. cit.*, III, 386-392; P. Mantoux, *The Industrial Revolution in the Eighteenth Century* (rev. ed., London, 1928), pp. 78-84; Sidney and Beatrice Webb, *op. cit.*, pp. 27, 45; H. Heaton, *The Yorkshire Woollen and Worsted Industries from the Earliest Times up to the Revolution* (Oxford, 1920), pp. 318 *et seq.* Combinations, probably of a more temporary character, are found among the coal miners in the early seventeenth century. *Acts Privy Council, 1613-1614*, pp. 534, 535; H. Hamilton, *The English Brass and Copper Industries to 1800* (London, 1926), p. 324; Lipson, *op. cit.*, III, pp. 386-392.

[20] See, e. g., act "for regulating the journeymen tailors", 7 Geo. I, c. 13 (1720), amended by 8 Geo. III, c. 17; act "to prevent unlawful combinations of workmen employed in the woolen manufacturers", 12 Geo. I, c. 34 (1725). Similar provisions were passed in 1756 and 1757 by acts, 29 Geo. II, c. 33, and 30 Geo. II, c. 12. For a list of these statutes, see R. Burn, *The Justice of the Peace* (26th ed., 1831).

[21] For seventeenth-century prosecutions, see *Records of the Borough of Nottingham* (London, 1882-1914), IV, 362; J. C. Jeaffreson, *Middlesex County Records* (London, 1886-1892), IV, 61-65; and *Cal. State Papers, Dom.*, Aug. 1-13, 1675. For eighteenth-century instances, see e. g., E. G. Dowdell, *A Hundred Years of Quarter Sessions: the Government of Middlesex from 1660 to 1760* (Cambridge, 1932), pp. 154, 155; Heaton, *op. cit.*, pp. 316, 317; A. P. Wadsworth and J. de L. Mann, *The Cotton Trade and Industrial Lancashire* (Manchester, 1931), p. 342; *London Chronicle*, Dec. 12, 1761, cited by M. Dorothy George, *London Life in the XVIII Century* (London, 1930), p. 368.

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People v. Melvin in the light of colonial experience

After a review of the English precedents, the early nineteenth-century American attorneys generally rested their case. In the *New York Cordwainers' Case,* however, a very fleeting examination of the provincial history of New York was actually attempted. Colden quite properly pointed out that under the constitution of the state only such part of the common law of England was adopted as was made part of the colonial law as of April 19, 1774. He further asserted that colonial experience afforded no evidence that labor combinations were considered illegal.[22] Nevertheless, Mayor Ratcliffe, in his charge to the jury, lightly dismissed the experience of over a century under English colonial rule, asserting: "No precedents, it was true, of convictions or judgments upon them had been produced from our own courts, but no strong inferences could be drawn from that, as until lately such precedents had not been preserved, and no printed reports of adjudged cases had been published." [23] Today some of the judicial, administrative and legislative records of the province and the city are available in printed form; the major manuscript collections are easily accessible, and a problem which was considered beyond the resources of the court in 1810 does not offer insurmountable obstacles to the present-day investigator.

In the American colonies administrative officials and the few writers who touched upon economic theory were in complete accord with prevailing mercantilist thought concerning the regulation of labor, wages and prices.[24] In the province of New York little consideration seems to have been given to theory, but much to mercantilist practices. On the whole combinations were looked upon with disfavor; nevertheless they existed almost from the beginning of settlement and greatly increased during the Revolutionary generation. Many of these were temporary combinations of master workers acting in concert to protest against fees or wages laid down by the

[22] *Trial of the Journeymen Cordwainers,* p. 83.

[23] 2 Wheeler C. C. 262 at p. 281.

[24] E. A. J. Johnson, *American Economic Thought in the Seventeenth Century* (London, 1932), pp. 104 *et seq.*, 205 *et seq.*

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city authorities. While not clear-cut labor situations, they nevertheless constitute acts which at common law might have been considered restraint of trade. Where workers were prosecuted criminally, it by no means appears that conspiracy was always the ground; the element of contempt of authority seems at least equally important.[25]

Several instances of collective action for higher wages or fees are found in the records of New Amsterdam, as the Dutch burghers seem to have been even more sympathetically inclined toward mercantilist practices than their English successors. In 1659 the porters and beer carriers petitioned for "an increase of wages in labouring at the goods." The Court of Burgomasters and Schepens postponed the matter and apparently failed to take final action.[26] Again, in 1663, the laborers at the public scales requested an increase in wages, which the Dutch authorities denied.[27] Other groups, such as the butchers and carmen, were recognized as guilds with monopolistic privileges and with fees regulated by the public authorities.[28]

In England early instances of collective action by skilled workers often took the form of petitions or protests against the activities of interlopers. Demands for wages and hours generally came later. In Boston in 1675 the county court fined a group of workers for riding an interloper out of town on a rail. The workers sought to justify their conduct on the ground that "hee was an interloper & had never served his time to the trade of a Ship carpenter & now come to worke in theire yard & *they understood such things were usuall in England.*"[29] The burghers of New Amsterdam had already

[25] But the community was always on guard against conspiracy situations, and, before being admitted to the freedom of the city, the inhabitant was required to take oath: "Ye shall know of no Gathering, Conventicles, or Conspiracies made against the King's Peace, but you shall warn the Mayor thereof." "Burghers and Freemen of New York", New York Historical Society, *Collections* (1885), p. 557.

[26] *Records of New Amsterdam* (hereafter *R.N.A.*), edited by Berthold Fernow (New York, 1897), VII, 209.

[27] *Ibid.*, IV, 227.

[28] *Ibid.*, VII, 258-260.

[29] "Records of the Suffolk County Court, 1671-1680", vol. II, edited by Z. Chafee and S. E. Morison, Colonial Society of Massachusetts, *Publications*, XXX, 602.

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wrestled with the difficult problem of competition by "Scots or traders" who did not have the burgher right.[30] Two instances occurred in New York in 1674. The first was under the Dutch reoccupation of the city, when the public carters complained in a petition to the city court "that there were some who intruded in that employment", and upon their departure sold their carts, horses and privileges to cart; in addition, certain boys engaged in trucking. The court decreed that the boys were not to "ride Cart any more."[31] The second protest occurred at the end of the year and after the English reëntry into the city. The porters petitioned that the brewers, bakers and others had been "setting day Laborers, on worke to carry up their corne and other things, which of right apperteynes to them"; the Mayor's Court ordered the crafts mentioned to employ one other than their own servants or the corn porters for this work.[32] In 1675 the coopers of South and East Hampton requested an order to prohibit coopers from working in the Hamptons who were not inhabitants there or who had not served their time as apprentices. During the winter Boston coopers, who had paid neither town nor county taxes, came to the Hamptons and worked at their trade; but the Hampton coopers were not in turn given reciprocal privileges in Boston.[33] The General Court of Assize ordered "that noe Cooper Shall bee admitted to make Cask without the Consent of the Magistrates and Officers of the Respective Townes."[34]

The first criminal prosecution for a "strike" occurred in New York City in 1677. Here the theory of the prosecution was contempt rather than conspiracy. The common council dismissed twelve carmen, or truckmen, "for not obeying the Command and Doing their Dutyes as becomes them in their Places," and, to quote the record,

[30] *R.N.A.*, VII, 232-235.

[31] *Ibid.*, VII, 122.

[32] MS. Mayor's Court Minutes, Dec. 1, 1674. Hall of Records.

[33] *Documents relative to the Colonial History of the State of New York* (Albany, 1853-87), XIV, 701, 702.

[34] *Minutes of the Common Council of the City of New York* (New York 1905), I, 3, 4 (hereafter *M.C.C.*). For other instances of interloping, see *infra*

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> for Such their contempt fyne either and every of them, three shillings a peece or els to carry fifteen Loads apeece to the Wharf of the Said Citty. And the said Persons being called into Cort and hearing their Discharge read unto them, They either and every of them for himselfe prayed to be admitted and that they would Submitt to ye Judgmt of ye Cort and Submitt to such Condicons as ye Cort should order & direct, Upon their Admittance and for the Fees of their doeing and performing their Dutyes for ye Citties buisines.[35]

Upon submission, the court admitted them to their old places at the same rates and required them to carry the same loads on pain of losing their places and of further prosecutions for contempt.

The first prosecution in the history of New York City which rested clearly on the grounds of criminal combination was that of the coopers' combination of 1680. According to the minutes of the governor's council, the coopers of the city, twenty-three in number, "subscribed a paper of combination" not to sell casks except in accordance with rates established by themselves under fifty shillings penalty to the poor. They were fined fifty shillings "to the church or pious uses", and those in the employ of the government were dismissed.[36] This was a combination to maintain prices rather than to demand higher wages; but such a combination would have been clearly criminal at this time according to English law.[37]

In 1684 the carmen, fifteen in all, were successfully prosecuted for refusing to obey the city regulations concerning their guild. They were discharged from the service and permitted readmittance on acknowledging their fault and paying a fine of six shillings. Apparently only three out of the fifteen complied with these penalties and were readmitted.[38] Here again, it appears that the laborers acted in concert, but the theory of their punishment was probably contempt rather than

[35] *Ibid.*, I, 64, 65.

[36] D. T. Valentine, *Manual* (New York, 1850), pp. 450, 451; Mrs. Schuyler Van Rensselaer, *History of the City of New York* (New York, 1909), II, 219, 220.

[37] See *infra*.

[38] *M.C.C.*, I, 146-148.

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conspiracy. The porters also proved recalcitrant on a number of occasions. In 1685 they collectively petitioned that a committee be appointed, which they nominated, to investigate regulations and rates prevailing in their guild.[39] When they appeared before the common council a few months later and refused to comply with the regulations concerning the cording of wood, they were dismissed from the service.[40] By the beginning of the following year, the council, acting upon recommendations of a committee of two, neither of whom was on the list of nominees sent up by the porters, approved a new schedule of rates, which apparently was an increase over the fees prevailing.[41] In 1695 the carmen petitioned for an increase in wages and for a limitation of their numbers to twenty-four, but the request was flatly denied.[42]

The Bakers' Combination, 1741

Of all groups of master workers or producers, the bakers were most consistently subjected to official regulation, which in this instance took the form of the medieval assize of bread. Both the Dutch and English municipal regulations of the city incorporated the assizes as a normal procedure. The relations between the authorities and the bakers were frequently productive of tense and exceptionally difficult situations; and the most colorful of the "strikes" of master workers in New York City took place in this occupation. As early as 1659 the bakers requested the Court of Burgomasters to increase the price of bread; the request was again made in 1663. Both petitions were successful.[43] Under English rule many such petitions are found. Thus, in 1691 the bakers appeared before the common council, "declaring Wheate to be Dearer then formerly" and moved the court "for a new Assize on bread", which was granted.[44] In 1693 the bakers were asked to appear in court to give their consent to an assize of bread to be approved by that body.[45] Again, two years later the bakers appeared and

[39] *Ibid.*, I, 146.
[40] *Ibid.*, I, 149.
[41] *Ibid.*, I, 174-176.
[42] *Ibid.*, I, 393.
[43] *R.N.A.*, IV, 220, 224; VII, 219, 220.
[44] *M.C.C.*, I, 254, 256.
[45] *Ibid.*, I, 329.

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complained "that the Assize of bread lately Made was Soe high that they Could Not Comply with the Same without being Loosers thereby or haveing little or no profit." Thereupon the court revised the price list.[46]

Of these instances of friction, the combination of bakers in 1741 is the most notable. The *New-York Weekly Journal,* April 20, 1741, assigned the following item to an inconspicuous portion of the sheet: "Last Week there was a general Combination of the Bakers not to Bake, because Wheat is at a high price, which occasioned some Disturbance, and reduced some, notwithstanding their Riches, to a sudden want of Bread." The issue of law which resulted was uncovered by Colden, of counsel for the defense in *People v. Melvin,* who, in 1809, described the incident in the court of general sessions:

> I have had an opportunity of examining the records of the criminal proceedings of our tribunals for a great number of years back. I have found an information which was preferred in the year 1741, against certain bakers, for combining not to bake bread but on certain terms. This indictment, however, concludes contrary to the form of the statutes. And it appears that no judgment was ever rendered upon it, so that it cannot be appealed to as an authority on either side; or if it is in favour of either, it must be the defendants, because it appears that the crime there charged was laid as an offence against some statutes, and not as an offence at common law.[47]

Emmet, special counsel for the prosecution, referred to this as

> an information against journeymen bakers for a conspiracy not to bake till their wages were raised. On this they were tried and convicted before the revolution; but, as the counsel says, it does not appear that any sentence was ever passed, from which he concludes that judgment was arrested. This undoubtedly is a *non sequitur.* The criminal may have become penitent, and the object of the prosecution having been obtained, judgment may never have been moved for; besides, it is well known that those records have been in such confusion that no one can tell what has happened in almost any case. But if judgment was

[46] *Ibid.,* I, 373-375.

[47] *Trial of the Journeymen Cordwainers,* p. 83.

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> arrested, let me point out the fault in the information on which it may have happened. It concludes against the form of the statute, whereas it should have concluded at common law, even if there had been a colonial statute regulating that subject, which does not appear. . . . On account of this defect, perhaps, judgment was never had; but the learned counsel, by relying on this record, admits that his clients' case is similar to that of the bakers; and contends that such a combination on their part is not indictable.[48]

The specious logic of the prosecution is of little help in determining why a conviction was not obtained. Colden's description of the information is in terms general enough to cover the strike of master bakers for higher prices recorded in the *New-York Weekly Journal*. On the other hand, there is no evidence to support Emmet's view that the case involved a strike of journeymen bakers for higher wages. The minutes of the Court of General Sessions contain no reference to this prosecution; those of the Supreme Court are missing for the year 1741 and the Mayor's Court minutes ignore the incident. No papers relating to the 1741 case are available today. The parchmen information was doubtless removed from an old bundle of papers of that year by Colden in the course of his investigations and appended to the papers in *People v. Melvin* by way of exhibit; but unfortunately the papers in the latter case are also missing. Nevertheless, the absence of the information and other papers does not preclude speculation, however idle, as to the cause for prosecuting the bakers for criminal conspiracy.

News of the bakers' combination very likely unnerved a community already in the throes of a mass hysteria which, with the possible exception of the New England witchcraft episode and the Charleston slave riots of 1739, was unrivaled in colonial history. The very same issue of the *New-York Weekly Journal* that carried the story of the bakers' combination published a proclamation by Governor George Clarke offering

[48] *Ibid.*, pp. 103, 104. Sampson, in refutation, properly points out that "the precedent produced by Mr. Colden, shows all it was cited for, that in the only record to be found of the kind, no conviction took place, or no judgment was given."

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eward of £100 for information leading to the conviction of nyone who set the fires which had caused destruction of prop-rty in the lower part of the island. For many weeks fires, elieved to have been of incendiary origin, laid waste a good art of the lower city. Rumors of a plot of negro slaves to urn the city gained widespread acceptance. The reckless tories of informers added to the consternation. The militia as called out. Panic-stricken souls fled with their belongings o the refuge of the Bowery or Harlem. The rest awaited the npending insurrection. During the spring months many egroes were convicted of seditious conspiracy on highly ubious evidence and burned at the stake; and the panic was ot allayed until summer.[49] To add to the general feeling of nrest, reports were filtering into the colony detailing the rogress of the naval campaign against the Spaniards and vague neasiness was felt as to the possibility of a naval attack upon ıe city. Wartime conditions were responsible for skyrocket-ıg commodity prices. Wheat was at the highest level for over generation,[50] and the price of bread in the provision colonies as up fifty per cent over the previous year.[51] The publica-on in the May 4th issue of the *Journal* of the drastic action ken a few months earlier by the Court of Sessions of Edin-ırgh to lower prices did not inspire the provincial authorities similar action. It does show, however, that the colonists ere aware of the crisis that arose in the mother country the

[49] D. Horsmanden, *Journal of the Proceedings in the Detection of the Conspiracy* (New York, 1744); G. W. Edwards, *New York as an Eighteenth Century Municipality, 1731-1776* (New York, 1917), pp. 115, 116; Colden MSS., N. Y. H. S.; *N. Y. Journal*, March 23, 1740.

[50] Anne Bezanson, R. D. Gray, M. Hussey, *Prices in Colonial Pennsylvania* (Philadelphia, 1935). Statistics gathered by Herman M. Stoker for New York city seem less satisfactory for this period. H. M. Stoker, "Wholesale Prices New York City, 1720-1800", Cornell University Agricultural Experiment ation, *Memoirs*, CXLII (Ithaca, 1932). See also G. F. Warren and F. A. arson, "Wholesale Prices in the United States for One hundred and thirty-e Years", *ibid.*, pt. i.

[51] Compare R. B. Morris, *Select Cases of the Mayor's Court of New York ty, 1674-1784* (*American Legal Records*, II) (Washington, D. C., 1935), p. , with *N. Y. Journal*, May 18, 1741. See also Bezanson, Gray, Hussey, . *cit.* The peak was recorded in June and a gradual decline in the price of eadstuffs took place until December. *Ibid.*, p. 381.

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year before, when wheat prices soared to prohibitive figures an rioting in the North of England and in Wales broke out especially in the coal fields.[52] These incidents were fresh i the minds of the members of the common council when on Apri 17th they petitioned the governor and council to prohibit th exportation of wheat from the province;[53] but the council impressed by the point of view of the back country wheat grow ers, refused to take the needed action.[54] Living in dread o arson and insurrection, strained by the stresses of war, an facing the prospects of an early famine, the population woul not likely view with equanimity a combination in restraint o trade involving basic necessities of life. It is not difficult t understand, therefore, why a combination of bakers not to bak until the city authorities raised the price of bread should, unde the existent circumstances, have been prosecuted as a crimina conspiracy. The fact that no conviction was obtained is sur prising in view of the hysterical tension which prevailed i the spring of 1741.[55]

Precedents existed in English law for prosecuting crimir ally a combination of producers to raise the prices of necess ties. The act of 27 Edw. III, st. 2, c. 3, against regrators an of 37 Edw. III, c. 5, against engrossers, and more directly th act of 2 & 3 Edw. VI, c. 15, which was aimed primarily a combinations to keep up prices charged to consumers, wer applicable in such a situation. Wright cites several instance of early prosecutions under some one of these statutes.[56]

[52] T. Tooke, *History of Prices* (London, 1838), I, 35, 40, 43 n., 46; T. Ashton and Joseph Sykes, *The Coal Industry of the Eighteenth Century* (Ma chester, 1929), pp. 115-117.

[53] *M.C.C.*, V, 19; E. B. O'Callaghan, *Cal. of Hist. MSS.*, pt. ii (Alban 1866), p. 543. When in 1710 the price of wheat had soared in Boston, a sh laden with wheat for export was disabled. Samuel Sewall, "Diary", Mas Hist. Soc., *Collections*, ser. 5, vol. VI, 280.

[54] "Calendar of Council Minutes, 1668-1773", N. Y. State Library, *Bulleti* LVIII (March, 1902), 111. For other sectional issues in provincial histor see C. W. Spencer, "Sectional Aspects of New York Provincial Politics POLITICAL SCIENCE QUARTERLY, XXX, 397-424.

[55] Other instances of bakers' "strikes" against the municipal assizes a found in Charleston in 1786 and in Augusta, Ga., as late as 1808. See *Do Hist. of Amer. Industrial Society*, II, 343-344.

[56] *The Law of Criminal Conspiracies and Agreements*, p. 47.

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leading case in the eighteenth century, subsequent to the New York bakers' combination, involved successful prosecution for a combination of this character.[57]

In determining the price of bread the authorities took into consideration the cost of materials. In 1773 the bakers petitioned for an increase on the ground that not only material, but also the wages of journeymen were higher. In reply the council revised the scale upward to allow a gross profit of seven per cent.[58]

Occasionally price regulations were met with stiff resistance. The year 1763, on the eve of the post-war depression, was marked by exceptionally high prices for many principal commodities, particularly foodstuffs.[59] As a result of a petition signed by the leading citizens of New York, a drastic ordinance regulating the prices of foodstuffs was adopted by the common council, more sweeping in character than any of the previous limited assizes. Two of the most prominent butchers of the day, John Carpenter and Jacob Arden, openly declared their intention of violating the assize. They were both punished by being turned out of the markets, and the former was disfranchised. But the very same day the council changed the prices of beef to satisfy the protestants.[60]

aissez-faire tendencies at the middle of the eighteenth century

Collective action by master workers was attempted in a number of other situations during the provincial period. In 1747 a large number of building trade workers petitioned Governor George Clinton against the practice of interlopers from the Jerseys who came into the city "in Several numerous Companys", exercising the trades of carpenter, bricklayer, etc.,

[57] See dictum of Lord Mansfield in Rex *v.* Eccles, 1 Leach, 274 (1783).

[58] *M.C.C.*, VII, 434; I. N. P. Stokes, *Iconography of Manhattan Island* (New York, 1915-28), IV, 835, 839; Virginia Harrington, *The New York Merchant on the Eve of the Revolution* (New York, 1935), p. 283.

[59] According to Stoker, *loc. cit.*, the peak of wholesale prices was reached in 1772 and there was a slight drop the following year. See also Bezanson, Gray, Hussey, *op. cit.*, pp. 422, 424.

[60] *M.C.C.*, VI, 336, 337; Stokes, *op. cit.*, IV, 737; Thomas F. De Voe, *The Market Book* (New York, 1862), I, 148 *et seq.*

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working at drastically lower wages, and bringing their own nails and building materials from other provinces.[61] The officials viewed such evidence of industrial solidarity with a certain suspicion, and the petition was submitted to rigid scrutiny. The authorities noted that, of the ninety-nine signatures on the petition, two of the workers had "signed twice" that three names were "feigned", that one signature represented a non-existent person, another a "highlander", and therefore suspect, that two were mere "labourers", and that one was actually a "cordwainer", and clearly out of place in the building trades. Less attention, however, was devoted to the economic issues raised by the carpenters and allied workers. The governor referred the petition to a committee, which advised the petitioners to seek their remedy under the city charter, which provided that strangers who exercised a trade in the city and failed to take up their freedom could be fined five pounds. The committee's further observation betrayed somewhat patronizing class bias:

> Secondly, The Council observe there are about Ninety nine Names to this Petition. That the Bulk of the persons who may be supposed to have subscribed their Names are obscure people altogether unknown to us in person and name excepting very few of them. If they are Freemen and there be at the time any real cause for such complaint, they must be ignorant and forgetful of the Obligations of the Oath of a Freeman of this City which is "The Franchise and Customs thereof to maintain and the City to keep harmless in that which in the is" and therefore the Council are of Opinion it becomes the Duty of every Freeman when the priviledges of the Citizens are invaded (to use the words of the petition) and who apprized thereof to warn the Mayor that the Remedy given by Charter may be applyed.

In 1769 Thomas Hardenbrook and other house carpenters, by petition to the common council, similarly complained against unfair competition of county carpenters coming to the city the summer season. The council courteously referred the

[61] "Burghers and Freemen of New York", N. Y. Hist. Soc., *Collections* (1885), pp. 507-511; "Calendar of Council Minutes", p. 363.

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matter to a committee, and then let it die.[62] But at least the applicants were spared a lecture on their civic duty.

The reluctance of the authorities to give any positive aid in these instances may be interpreted as evidence of laissez-faire tendencies in favor of freedom of trade. Additional support may be found in the fact that, once a man had been admitted to the freedom of the city after having served an apprenticeship, he apparently could and did freely transfer to other crafts or trades, if he wished.[63] Possibly the authorities may have been influenced by the custom of London in this matter, as they were in other important economic and legal practices.[64] As early as 1615 the mayor's court of London in *Tolley's Case,* a proceeding on the apprenticeship clauses of the Statute of Artificers, sustained a plea in bar showing that there was a custom of London that any freeman of London who had been apprenticed to one trade for seven years might lawfully relinquish that trade and take up another.[65] By the eighteenth century, although appeals of the craftsmen to the courts for protection against outside workers, or against those who had not served their full apprenticeship, were not infrequent, the English jurists showed no disposition to enforce the law and encouraged the rise of a free labor market and large-scale industry. Many early English labor combinations were formed primarily to maintain these earlier restrictions against interlopers; but when such combinations petitioned, the English authorities answered: "Trade ought to be free and not restrained." [66]

[62] *M.C.C.*, VII, 177; Samuel McKee, Jr., *Labor in Colonial New York* (New York, 1935). Stokes (*op. cit.*, IV, 797, 798) observes that "the situation appears to have been settled by private agreement, as the committee made no report of record." This is hardly convincing evidence of agreement or of any action whatsoever.

[63] McKee, *op. cit.*, p. 44.

[64] See Morris, *Select Cases of the Mayor's Court,* Introduction.

[65] R. H. Tawney and E. Power, *Tudor Economic Documents* (London, 1924), III, 378-383.

[66] For instances of late seventeenth and early eighteenth century organizations of workers to exclude outsiders, see George Unwin, *The Gilds and Companies of London* (London, 1909), p. 343; *Industrial Organization in the Sixteenth and Seventeenth Centuries,* pp. 212, 213; Wadsworth and Mann, *The Cotton Trade and Industrial Lancashire,* pp. 341, 343; E. Lipson, *Woollen*

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Combinations on the eve of the Revolution

These early combinations which have been discussed mainly involved master workers or producers, who, as the Webbs pointed out for England, sold nothing but labor, and their own labor only. For such groups the old guild policy of monopoly was more or less feebly kept alive.[67] To that extent, then, they differ from later combinations of labor against capital. Mantoux has demonstrated that, as long as the distinction between master and men working side by side in small shops is almost negligible, "as long as the journeyman can cherish the hope of one day becoming a master, grievances remain unconnected incidents without much significance." When class stratifications become more distinct, when the vast majority of workers are forced to abandon hope of ever being admitted into the more favored class, the cleavage of interests takes on a permanent form. Instead of temporary combinations, permanent societies appear, and the weapon of the strike gradually develops as a normal part of labor tactics.[68] During the Revolutionary Era such class differences became more sharply defined, and journeymen in many cases faced the future without hope of rising in the economic order.

While reluctant to form permanent associations for purely economic ends during this period (such combinations in the main were nurtured in the unrest of the critical years of the Confederation), the workers actively combined to advance their economic interests by means of the ballot and acted as a class in resistance to the British policy beginning with the Grenville ministry. In the Revolutionary generation we find far greater class consciousness than at any previous period in the history of the colonies. Obviously such class attitudes were not as

and Worsted Industry, p. 211. For the treatment of such petitions in both higher and lower courts, see Heaton, *The Yorkshire Woollen and Worsted Industries from the Earliest Times up to the Industrial Revolution*, pp. 309-310; Wadsworth and Mann, *op. cit.*, p. 351; Dowdell, *A Hundred Years of Quarter Sessions*, pp. 174, 175; O. J. Dunlop and R. D. Denman, *English Apprenticeship and Child Labour* (London, 1912), p. 224; E. Lipson, *op. cit.* pp. 85, 116, 117.

[67] Webb, *op. cit.*, pp. 8, 26.

[68] *The Industrial Revolution of the Eighteenth Century*, p. 76.

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sharply accentuated as in contemporary England, where men of property thought of the laborers as a composite class—"the lower orders" and "the meaner sort", who, according to eighteenth-century mercantilists, were more in need of "discipline" than employment. In certain occupations, such as coal mining, they were frequently regarded as not only uncouth, but also degraded.[69] Men of wealth in America, particularly those of Tory persuasion, expressed similar views, somewhat less forcefully. The practice of transporting large numbers of felons to America did not increase the esteem in which the working class was held in the colonies. Governor Wright of Georgia referred to the carpenters, shoemakers and blacksmiths who seized the leadership in the Continental Association, as "a Parcel of the Lowest People." Governor Dunmore of Virginia deplored that "the men of fortune and pre-eminence joined equally with the lowest and meanest", and Hutchinson of Massachusetts criticized the membership of the Revolutionary government as consisting of "the rabble of the town of Boston." General Pattison, writing from New York to Lord Townshend in 1779, distinguished between the 'Capital Merchants and Shopkeepers" who volunteered their labor on the fortifications of the city, and "the lower class" who received ten shillings a day. Where less partisan, the upper class generally designated the workers as the "inhabitants" or the "mechanics".[70] The Whig leaders, on the other hand, drawing their support heavily from the mechanics and laborers, brushed aside class differences and enthusiastically acclaimed the workers. In 1770 the New York Sons of

[69] Henry Fielding, *Enquiry into the Late Increase in Robbers* (London, 1751); Elizabeth W. Gilboy, *Wages in Eighteenth Century England* (Cambridge, Mass., 1934), pp. xviii, xix n.; D. Marshall, *The English Poor in the Eighteenth Century* (London, 1926); George, *London Life in the XVIIIth Century, passim;* Furniss, *The Position of the Laborer in a System of Nationalism*, p. 104; Nef, *The Rise of the British Coal Industry*, II, 151 *et seq.*, 175.

[70] William Smith, *History of New York* (New York, 1830), p. 333; 4 *American Archives*, I, 775, 1062; Georgia Historical Society, *Collections*, III, 228; J. K. Hosmer, *The Life of Thomas Hutchinson* (Boston, 1896), pp. 103, 104; C. L. Becker, *The History of Political Parties in the Province of New York, 1760-1776* (Univ. of Wisconsin, *Bulletin* no. 286, Madison, 1909), p. 115; N. Y. Hist. Soc., *Collections* (1875), pp. 127, 128.

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Liberty referred to the mechanics "and the virtuous of al other ranks."[71] Thomas Young, one of the fiery radicals a Newport, wrote John Lamb, extremist leader in New York i 1774: "Your Mechanics have become a praise and rejoicing Mr. Atherton is a member of that respectable class of man kind."[72]

The middle of the eighteenth century, and more notably th Revolutionary generation, witnessed the gradual increase o various combinations of merchants, producers, members o occupational groups, and artisans for attaining particular eco nomic or political ends. Outside of New York early instance could be found in the ill-fated "New London Society Unite for Trade and Commerce", incorporated in Connecticut i 1732,[73] and in the combination of the New England manu facturers of spermaceti candles in 1761 to control manufactur and prices and to endeavor "by all fair and honourable mean to prevent the setting up any other Spermaceti works."[74] I Philadelphia, Boston, Newport and New York the merchant combined to restrict the activities of price-cutting vendu masters and to discourage country peddling.[75] In industry th domestic system was spreading, especially among the weavers and capitalists were employing large numbers of workers wh no longer looked forward to graduating into the employe ranks. In addition, large numbers of workers were now foun in such enterprises as grist mills and iron works.[76] During thi period New York City had a small linen factory with fourtee

[71] *Brutus to the Free . . . Inhabitants*, Lenox Broadsides, N. Y. P. L.

[72] Newport, Oct. 4, 1774, Lamb MSS., N. Y. H. S.

[73] F. B. Dexter, *Biographical Sketches of the Graduates of Yale Colleg 1701-1745* (New York, 1885), p. 204; Colonial Society of Massachusetts, *Pub lications*, V, 96-111; VI, 6-11.

[74] "Commerce of Rhode Island, 1726-1800", vol. I, Mass. Hist. Soc., *Collec tions*, 7th ser., IX, 88-92; Arthur M. Schlesinger, *The Colonial Merchants an the American Revolution* (New York, 1917), p. 29.

[75] C. H. Lincoln, *Revolutionary Movement in Pennsylvania* (Philadelphia 1901), pp. 80-89. See also *infra*, New York Chamber of Commerce.

[76] Rolla M. Tryon, *Household Manufactures in the United States, 1640-186* (Chicago, 1917), pp. 245, 246, 255; Arthur C. Bining, *British Regulation o the Colonial Iron Industry* (Philadelphia, 1933), p. 89; E. Abbott, *Women i Industry* (New York, 1910), p. 38.

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looms, a paper mill, a beaver hattery, a glass house, two breweries, a spermaceti candle works, and extensive shipyards.[77]

The scarcity of labor in New York and the increase in the number of workers employed in the small factories of that day caused business men to combine in 1758 and set wage scales. The *New-York Mercury* of August 7, 1758 carries the following item:

> New-York, August 7.
>
> For the encouragement of Ship-Carpenters, able Seamen, and Labourers, in the Country, and the neighbouring Provinces, to repair to the City of New-York; The Merchants of this City have agreed to give to Ship-Carpenters 8s. per Day; able Seamen 5s. and Labourers 4s. with the usual Allowance of Provisions; and no other, or greater Wages whatsoever. And all Persons liking the above Proposals, may be certain of constant employment.

There is no evidence that this combination was prosecuted at law; and it will be seen that the absence of prosecutions of masters' combinations is especially characteristic of the post-Revolutionary period. Other combinations of masters appeared in the sixties. In 1764 a "Society for the Promotion of Arts, Agriculture and Economy in the Province of New York" was formed in direct imitation of societies already founded in London, Dublin and Edinburgh.[78] It was designed to encourage high standards of industrial output, to promote certain industries, notably flax mills, and to encourage and train workers to enter the latter industry by setting up a flax-spinning school and offering prizes to the more productive workers.[79] The mother country called such colonial societies "public companies of artizans."[80] One of the most signifi-

[77] *Cf., N. Y. Journal*, March 23, May 26, 1768; Oscar T. Barck, *New York City during the War for Independence* (New York, 1931), pp. 16, 17.

[78] *N. Y. Gazette*, Nov. 29, Dec. 6, 13, 1764.

[79] *N. Y. Mercury*, Feb. 25, 1765.

[80] The *Boston Chronicle*, Jan. 18-25, 1768, published this item from its London news: "They write from New-York, that a resolution has been taken to establish public companies of artizans, who were to be endowed with certain privileges, for the benefit of trade and increase of manufactures; and it was said the (that) Boston and Philadelphia would follow the example."

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cant rules laid down by the Society was the provision "That no Member do receive unto his Service any Overseer, or Gardener, or white Servant, Male or Female, who shall not be able to produce a Recommendation in Writing, from the Master, or Mistress, whom they last served, in this Colony." [81] This agreement closely paralleled the practice enforced among the collieries of Scotland where the workers were reduced to a status of virtual servitude.[82] Such an understanding was a threat over the heads of labor organizers and insubordinate workers. An organization similar to the Society of Arts was almost immediately thereafter set up on Long Island.[83]

In order to deal with the general problems of trade, producers' combinations and labor, the Chamber of Commerce was organized in the late sixties and received a charter of incorporation from Cadwallader Colden in 1770.[84] In 1768 it effectually checked a combination among the bolters, millers, bakers and flour merchants to raise the prices of flour and bread. The Chamber purchased a considerable cargo of flour at Philadelphia and brought about an agreement with the New York flour combination to reduce prices.[85] During the War of Independence the Chamber was to play an important rôle in labor relations.

This period is also marked by an increasing number of combinations of mechanics and laborers, primarily for political purposes. Such combinations to resist the British commercial and retaliatory policy after 1763 are too well known for extended comment here. In the non-importation agreements, boycott and violence which marked combinations of Whig forces after the Stamp Act, the Townshend Acts and the First Continental Congress, the underprivileged mechanics and laborers, urged on by fiery organizers, such as Lamb, Sears and

[81] *N. Y. Gazette*, Dec. 20, 1764.

[82] Nef, *op. cit.*, II, 158.

[83] *N. Y. Gazette*, Dec. 27, 1764.

[84] John A. Stevens, Jr., *Colonial Records of the New York Chamber of Commerce* (New York, 1867), pp. 3-7, 67, 89.

[85] *Ibid.*, pp. 21, 23, 32. During the War of Independence the Chamber acted as adviser to the military authorities in regulating prices of flour and bread in an endeavor to prevent wartime profiteering. *Ibid.*, pp. 223, 225, 226, 275-277.

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John Morin Scott, actually forced the ultimate issue and wrested the leadership from the timorous mercantile interests.[86] As in the post-Revolutionary period, both mechanics and entrepreneurs had much to gain by boycotting British manufactures, and in such activities the workers took the initiative.[87]

The post-Revolutionary political activities of the mechanics as an occupational group were foreshadowed in the seventeen sixties, when they joined with the merchants, in the election campaigns of 1768 and 1769, and opposed the Livingston faction. The candidacies of lawyers, and notably John Morin Scott, who, while a leader of the "Liberty Boys", was anathema to certain elements of the mechanics class, were exposed to a vitriolic attack.[88] This sharpening cleavage of the classes, which was paralleled in other provincial cities, produced a mental climate favorable to labor combinations.

Consumers likewise combined, doubtless spurred on by the experience of the anti-British boycott. In 1766, and again in the following year, a group of consumers in New York, ostensibly to "provide wool for the employment and clothing of the industrious poor," collectively engaged not to purchase or eat any lamb before a certain date. In this way they planned to increase the stock of wool available for domestic manufacture.[89] It would appear that such collective agreements were actively supported by mechanics' groups already in existence.

[86] See *N. Y. Journal*, Sept. 8, 15, 1768; *N. Y. Post Boy*, Sept. 12, 1768. See also Becker, *op. cit.*, pp. 34, 120; Schlesinger, *op. cit.*, pp. 91, 92, 290, 345; Barck, *op. cit.*, p. 29. In Charleston it is clear that the labor question was a primary factor in aligning the mechanics aggressively on the Whig side. Leila Sellers, *Charleston Business on the Eve of the American Revolution* (Chapel Hill, 1934), pp. 102-105, 203, 204, 206-210.

[87] See especially the Report of the Committee Appointed by the Inhabitants of the City on Dec. 29, 1768, "to consider measures to encourage industry and frugality and employ the poor." Broadside, N. Y. P. L. The committee endorsed the activities of the Society for Arts, previously discussed, particularly with reference to the linen manufactures of the city.

[88] *N. Y. Mercury*, Jan. 16, 1769; "John Morin Scott", *Dictionary of American Biography*. For the broadsides, chiefly published by John Holt, see New York Public Library, *Bulletin*, III, no. 1, 23-33. See also Becker, *op. cit.*, pp. 18-20. For a similar organization of mechanics and tradesmen to elect mechanics to the assembly from Philadelphia, see *Pennsylvania Gazette*, Sept. 27, 1770.

[89] *N. Y. Journal*, Feb. 12, 1767; De Voe, *op. cit.*, I, 150, 151.

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For example, on April 10, 1769, the Society of Cordwainers in the City of New-York, "resolved not to eat any Lamb in their Families, till the first of August next," and that same evening the Sons of Liberty signed an identical agreement.[90]

An interesting instance of a combination of mechanics in provincial New York, ostensibly for purposes of mutual aid is revealed in a broadside published by the Friendly Society of Tradesmen House Carpenters, which was organized in 1767. This was a typical mutual aid society restricted to a single trade. According to the broadside, membership was limited to house carpenters within the ages of twenty-one and forty. An initiation fee of four shillings and a monthly payment of one shilling six pence went to a general fund which provided sick benefits for members. After the first six days of illness the member was entitled to ten shillings a week during his illness. At death four pounds were to be paid from the treasury for funeral expenses.[91] Friendly societies, also known as "box clubs", had during this period spread rapidly in the mother country. Such organizations were often a mask for labor combinations of an illegal character, and the boundary between the friendly society and the trade union came to be extremely shadowy.[92] There is no evidence that the New York society was opposed by the authorities, or that it was operated for other than the purposes announced at its formation. This

[90] *N. Y. Journal*, April 13, 1769; J. G. Wilson, *Memorial History of the City of New York* (New York, 1892-93), II, 400.

[91] "Articles and Regulations of the Friendly Society of Tradesmen House Carpenters", March 10, 1767, Broadside, Evans Collection, No. 24,606—N. Y. P. L.

[92] For examples as early as 1688, see Wadsworth and Mann, *op. cit.*, pp. 341-375. Other instances are cited by Mantoux, *op. cit.*, pp. 78-84; Heaton, *op. cit.* pp. 317, 318; Webb, *Trade Unionism*, p. 24; *Industrial Democracy*, pp. 153-154. The worsted smallware weavers of Manchester, acting under the guise of a friendly society, were prosecuted in 1760 as a combination to raise wages *Manchester Mercury*, March 25, 1760, cited by G. W. Daniels, *The Early English Cotton Industry* (Manchester, 1920), p. 44. An important motive for the Friendly Societies Act of 1793, which provided for the registration of friendly societies, was the desire to confine them to specific activities approved by the authorities. See Bowden, *op. cit.*, pp. 297, 298. For a general survey see Sir Frederick Eden, *Observations on Friendly Societies* (London, 1801), pp 5-7; *The State of the Poor* (London, 1797), I, 461; II, 58, 310; III, 873, 874

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is likewise true of the Marine Society, organized in 1770 for the relief of indigent shipmasters and their families.[93]

At least one "strike" occurred in this period. Because of a "late Reduction of the Wages of journeyman Taylors" in New York, about twenty tailors decided on March 31, 1768 to go on strike and advertized that they would work in families at "three Shillings and Six Pence per Day" with "Diet". Their "House of Call" was at the "Sign of the Fox and Hounds", in Moravian (Fulton) Street.[94] They were careful to make no direct statement that they had refused to work, but merely asserted that they could no longer support themselves and their families "by working as Journeymen." This is evidence of a concert of workers to compete directly with their former masters in retaliation for a cut in wages.

Methods foreshadowing the strike and boycott extensively employed a generation later marked the critical days of the First Continental Congress. At that time combinations of workers in New York and Boston were formed to withhold their labor from the British authorities. When Governor Gage, in September 1774, sought to hire Boston workers for the fortifications, he was met with flat refusals. The Committee of Mechanics warned their fellow-workers in New York that the governor would call upon them to satisfy his labor needs. In New York pressure had already been brought to bear on labor contractors to prevent the exportation of carpenters to Boston, and the mechanics fully coöperated in the "strike" measures.[95]

[93] This institution is still actively functioning in New York City. Its original incorporators included leading merchants active in marine insurance as well as shipmasters. *The Marine Society of the City of New York* (New York, 1933). The host of societies which sprang up in the colonial cities of the Atlantic seaboard for the purpose of assisting immigrants, such as the Scots' Box of Boston, the Welch Society, and the Hibernian Club in Philadelphia, and the St. Andrew's Society in New York, were principally immigrant aid groups and were not organized along vocational lines. Erna Risch, "Immigrant Aid Societies before 1820", *Penn. Mag. of Hist. and Biog.*, LX, 15-33; Mass. Hist. Soc., *Proceedings*, LVI, 48. See also G. J. Gongaware, *The History of the German Friendly Society of Charleston, South Carolina, 1766-1916* (Richmond, 1935).

[94] *N. Y. Journal*, April 7, 1768.

[95] *N. Y. Journal*, Sept. 15, 29, 1774; 4 *Amer. Arch.*, I, 782, 803, 804. Subsequent difficulties in the Boston area are treated by Schlesinger, *op. cit.*, pp. 387, 388.

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The relative backwardness of colonial industrial developments along many lines, as compared with England, explains the infrequency in the pre-Revolutionary period of labor combinations primarily for economic rather than political purposes. In London at this time far more aggressive and numerous labor combinations operated. Franklin, writing on May 14, 1768, has given us a graphic picture of labor conditions in the English capital:

> Even this capital is now a daily scene of lawless riot. Mobs patrolling the streets at noonday, some knocking down all that will not roar for Wilkes and liberty. Courts of justice afraid to give justice against him. Coalheavers and porters pulling down the houses of coal merchants that refuse to give them more wages; sawyers destroying sawmills; sailors unrigging outward bound ships, and suffering none to sail until merchants agree to raise their pay; watermen destroying private boats and threatening bridges.[96]

In American cities, on the other hand, working-class organizations were directed primarily to the redress of grievances which were attributed, not to local trade relations between master and servant, but to the imperial policy of the mother country.

Labor combinations during the British occupation of the city

More serious economic tension between labor and capital in New York can be traced to the years of the Revolution when the city was under British military occupation. The army, the police and the Chamber of Commerce mediated disputes between master and worker; but aggressive combinations of workers were naturally checked by the military authorities.

The same situation existed outside the city with the continental forces. Artisans, needed to erect fortifications and for other military purposes, were formed into companies, with wages fixed by the Provincial Congress—for example, ten dollars per month and one ration for artisan-privates in the company at Fort Constitution in 1776.[97] This amounted to maximum wage legislation enforced by military penalties. In 1778 the legislature of the state passed "an act to regulate

[96] *Memoirs* (London, 1818), III, 315.

[97] *Journals of the Provincial Congress, 1775-1777* (Albany, 1842), I, 299.

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the wages of mechanicks and labourers, the prices of goods and commodities and the charges of inn holders within this State, and for other purposes therein mentioned." [98] Rates for farmers and mechanics were set at a figure not exceeding a seventy-five per cent advance over those which had obtained in 1774. Prices of commodities and manufactured articles were similarly fixed. Under the statute informations or indictments could be brought against violators of its provisions before a justice of the peace of the county where the offense had been committed, and fines of treble damages could be imposed; but if such treble damages exceeded five pounds, an action of debt was to be brought instead in any court of record, the defendant to have bail as in an action of debt, but to be deprived of wager of law. Clearly serious infractions of the act were not to be punished by the criminal machinery of the law, a fact which is significant in the light of the nineteenth-century decisions punishing criminally collective action to raise wages. Under an act passed in 1780 "for a general limitation of prices",[99] the penalty of treble the value or price of the services or commodities could be exacted, but actually the "wages of tradesmen and mechanics", though mentioned, were not set under this statute, which dealt primarily with commodities. During a period of wartime profiteering, inflation and labor scarcity, laissez-faire doctrines were apparently scrapped for the time being, and old mercantilist regulations, long abandoned in general practice, were revived. This was likewise true of the situation in the city under British control.

Relations between the military authorities and the labor group during the occupation were frequently strained. The army employed large numbers of civilian workers, notably in the shipyards, baggage train, and commissary department. These artisans and laborers were virtually under military rule.[100] In other fields, official regulation of rates and wages

[98] 1 Laws of N. Y., 1st sess., c. 34. [99] 1 Laws of N. Y., 3d sess., c. 43.

[100] If any precedent had been needed for this it might have been found in an early intercolonial war when labor in New York City was impressed in 1706 for work on the fortifications. The citizens and freeholders were given the option of appearing in person with spade, shovel, or pickaxe, or of having laborers appear for them. *M.C.C.*, II, 303-305. According to a newspaper

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was attempted. Continuing the venerable policy of the colonial municipality of treating the carmen as a quasi-public utility, the authorities set maximum rates for the truckmen, which went into effect after December 1777. In 1779, at the suggestion and with the advice of the Chamber of Commerce, a reduced scale went into effect. All strikes or combinations to secure higher wages were obviously outlawed by a regulation which provided the penalty of imprisonment for non-observance or refusing to haul the first load offered. During this period of high living costs, it was possible for a carman to earn at times as much as fifteen shillings a day, when employed. The Chamber, which virtually dictated the rates, actually asserted, with no supporting evidence, that the average carman's wage ranged from forty to one hundred shillings.[101]

In 1779 Major-General Pattison, Commandant of the Garrison of New York, reported to the Board of Ordnance that there was "a general Discontent prevailing among the Body of Artificers employed in the Ordnance Service", because their wages were considerably lower than rates obtained by similar craftsmen in other departments of the government. At the shipyards carpenters were receiving four or five times the wages paid in the ordnance service. Pattison's concluding remarks need no comment:

> I have receiv'd two Memorials in the Name of the Artificers, setting forth their Grievances & praying for an Augmentation of Pay, to be upon the same Footing at least, as those in other Branches of the Public Service. I have pacified their Minds for the present, by giving them to understand that I wou'd lay their Complaints before the Honble Board, and would cause them to be inform'd whenever I shou'd know the Determination you shall be pleas'd to take thereupon. We are now in great Want of more Artificers, but none will enter on the present

account, all persons were "forbid all manner of Labour, and all the shops shut up until the Fortifications of the City be finished, so that we have near 1000 men at work every day." *Boston News Letter*, Aug. 5, 1706.

[101] H. Gaine, *Mercury*, Jan. 8, Dec. 14, 1778; Sept. 20, 1779; James Rivington, *Royal Gazette*, Oct. 21, 1780; *Colonial Records of the Chamber of Commerce*, pp. 208-214; Loyalist Transcripts, vol. XLI, p. 222. See also Barck, *op. cit.*, pp. 137, 138. The old practice of setting the assize of bread was also observed by the commandant. *N. Y. Gazette*, Aug. 9, 16, 1779.

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Wages, and nothing prevents those we have from leaving the Service, but the Fear of being tried by Martial Law, as Deserters, which they are threatened with, in case they Abscond.[102]

One of the earliest organized demands of labor upon capital in the city of New York occurred in the printing trades in 1778. In that year the journeymen printers, viewing the exorbitant increase in the cost of living, demanded a substantial increase in wages. Intrenched Tory though he was, and a newspaper publisher to boot, James Rivington actually published this important labor incident in his *Royal Gazette* under date of November 14, 1778:

New-York, Nov. 9, 1778.

Gentlemen,

As the necessaries of life are raised to such an enormous price, it cannot be expected that we should continue to work at the wages now given; and therefore request an addition of Three Dollars per week to our present small pittance; It may be objected that this requisition is founded upon the result of a combination to distress the Master Printers at this time, on account of the scarcity of hands; but this is far from being the case; it being really the high price of every article of life, added to the approaching dreary season. There is not one among us, we trust, that would take an ungenerous advantage of the times —we only wish barely to exist, which it is impossible to do with our present stipend.

There is scarcely a common Labourer but gets a Dollar per day and provisions, and the lowest mechanicks from 12 to 16 s. per Day.

We wait the result of your determination.

The Journeymen Printers

To the Master Printers, New-York.

I do consent to the above Requisition.

JAMES RIVINGTON

This experience of the journeymen printers in collective bargaining is of special import. Their demands were made as a trade group against the master printers of the city. Beginning in May of that year Rivington and other printers of newspapers

[102] "Letters of General Pattison", N. Y. Hist. Soc., *Collections* (1875), pp. 7, 68.

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in the city established a mutual daily gazette, first for five and then for six days a week, an arrangement that produced virtually the first daily newspapers in America. The protest of the printers was a threat against the continued life of this daily newspaper carried on in this ingenious manner, a threat couched in courteous language. The hesitancy of the journeymen to be labeled "a combination to distress the Master Printers" is readily understandable in the light of the treatment accorded other combinations in the city in the past and the prosecutions of labor combinations in England at this time.[103]

Combinations during the post-war depression

During the trade depression which followed the War of Independence, the mechanics sought to combine, ostensibly for philanthropic purposes, but they were violently resisted by the propertied groups and checked by state authorities. By this time the laboring class had become a class-conscious group within the city, actively participating in the political affairs of the day. Thus, in the election for the assembly held in the spring of 1785, the mechanics nominated candidates from their own ranks in preference to the "pedantic lawyer", "the wealthy merchant", and "the lordly landholder", whose interests, they maintained, were "sufficiently attended to" already. They nominated four shoemakers, three smiths, two tavern-keepers four hatters, three printers, one blockmaker, one sailmaker three carmen, three carpenters and three tailors—an interesting combination of skilled and unskilled laborers who would be far less likely to coöperate in an English metropolis at that time.[104] Two of this group, a shoemaker and a smith, were subsequently elected to the assembly.[105] The motives for this

[103] Pasko refers to this strike without mentioning the date. *American Dictionary of Printing* (New York, 1894), p. 390. D. J. Saposs was unable to verify the incident, probably because he assumed Pasko meant 1776. J. R. Commons *et al., History of Labour in the United States* (New York, 1918), I 25. The same date is also accepted without substitution by G. A. Tracy. *History of the Typographical Union* (Indianapolis, 1913), pp. 17, 18. Lee calls this "in all probability . . . the first strike of printers in America." J. M. Lee, *History of American Journalism* (Boston, 1917), p. 96.

[104] See George, *London Life in the XVIIIth Century*, pp. 156, 157.

[105] *N. Y. Packet*, April 4, 7, 14, 21, 24; *N. Y. Gazetteer*, April 15; *Morning Post*, April 21, 1785.

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occupational grouping were forcefully and succinctly stated. The upper class had already combined, one writer argued: "The great, the rich, the mighty and powerful ones, are constantly classed together; for what purpose? to prey upon the weak, the poor, and helpless,—the former would have the assurance to say it is to protect! Experience, dear bought experience, proves the reverse." The desire to free themselves from a paternalism imposed by the propertied groups doubtless led to the formation a few months earlier of a Mechanics Society, for which the membership sought a charter from the legislature. Here was something more than a philanthropic society restricted to a single craft. In operation the various crafts sent delegates to a General Committee of Mechanics, which carried on the business of the organization.[106] It was potentially a combination of all types of mechanics regardless of craft, and the inherent dangers of such a plan were clearly perceived. The press, reasonably impartial in labor news in this period, carried columns attacking the dangers of combination and the possible effect of such activity upon wages.[107]

The arguments used by the Council of Revision in objecting to the bill to incorporate the tradesmen and mechanics of New York City disclosed a deep suspicion that hidden economic motives lay behind the combination and a reasoning consonant with laissez-faire thought. As for the charitable objects of the bill, the council maintained, there were sufficient charitable societies already. The contributions for the support of charity, and the loss of time involved in attending meetings, would of necessity operate as a tax on members, thus inducing them to employ means to keep up the price of labor or subjecting them to low-wage competition by other mechanics. Since the by-laws of the society were made to depend, in some measure, upon the will of mayor and aldermen, the council looked askance upon a possible union of interest of officials and mechanics which would tend toward a dangerous monopoly. The forty-three persons named in the bill would be given such

[106] *Annals of the General Society of Mechanics and Tradesmen of the City of New-York from 1785 to 1880*, edited by T. Earle and C. T. Congdon (New York, 1882), p. 9.

[107] *N. Y. Packet*, Feb. 21, 24, 28, 1785.

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broad discretionary powers, it was argued, that they could restrict the membership within any limits or expand it fantastically. It was also argued that "the interests of the State require that every encouragement should be given to industrious emigrants; no stranger who may choose to reside among us, should therefore, beside the unnecessary and useless expense of taking up his freedom, be compelled to struggle against a combination vested with corporate powers, and interested in keeping him unemployed."[108] Here was laissez faire repudiating mercantilism and medievalism in behalf of a free labor market and low wages. The bill was not passed over the veto.

When, in 1785, the shoemakers of New York went on strike for higher wages,[109] their masters entered into an employer-combination to bargain more effectively with them. The masters demanded that the workers agree to work for no one who sold English shoes, particularly one Smith, the *bête noire* of the trade, whose crime consisted in large-scale production and the accumulation of stock which he sold at low prices. To this demand the workers refused to agree. After a strike lasting over three weeks and during the most severe season of the year, the employers took back the workers at the old rates. Doubtless Smith's public announcement that he needed a number of good workmen for his shoe factory and the publication of his low scale of prices ended the impasse.[110] The significant fact, though, is that the authorities appear completely indifferent to a combination of masters manifestly in restraint

[108] C. Z. Lincoln, *Messages from the Governors* (Albany, 1909), II, 228 *et seq.* Finally, in 1792, the Society of Mechanics and Tradesmen of the City of New York, for Charitable Purposes received a charter from the legislature. *Annals of the General Society*, pp. 16, 18, 22.

[109] D. J. Saposs arbitrarily places the first strike of wage-earners in this country in Philadelphia, in 1786—a printers' strike. Commons, *et al., History of Labour*, I, 25. Selig Perlman takes the same position, and asserts that all earlier so-called strikes were by master workmen against municipal regulations of prices. *A History of Trade Unionism in the United States* (New York, 1922), p. 3. Certainly the shoemakers' strike of 1785 and the printers' strike in 1778 should take precedence.

[110] *N. Y. Packet*, March 21, 1785. The *N. Y. Packet*, March 31, 1785, carried a reprint of an article from the *Pennsylvania Gazette* detailing a meeting of the cordwainers of Philadelphia, who agreed not to buy or sell any European manufactures nor to work directly or indirectly for any one who bought or sold such goods.

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of trade. In this, their policy closely paralleled that of the British courts, which were at this time punishing combinations of labor with ruthless consistency, and, with similar consistency, if less logic, completely overlooking anti-labor combinations of masters.[111]

In the light of these numerous instances of labor combinations and collective action of producer or worker groups in the colonial and Revolutionary periods, and in the post-war depression, Thomas Addis Emmet's contention in *People v. Melvin* that the absence of combination "might be attributed to the paucity of manufactures and manufacturers, which rendered such a combination almost impossible and unknown"[112] is a fortunate illustration of that fatal instinct for historical generalization, which has occasionally served the legal profession when the requirements of exact scholarship proved too onerous. It is true that continuous associations of wage-earners or employers are generally not found in New York, Philadelphia or other cities until the nineties.[113] The rise of such permanent associations raised far more serious problems than the sporadic and temporary, if not infrequent, combinations of the Revolutionary generation; and the machinery of the criminal law was shortly to be invoked by employers in a vigorous effort to thwart the growth of trade unionism. Nevertheless the haphazard and infrequent prosecutions of producers or workers acting in concert in the colonial and Revolutionary city hardly serve as satisfactory precedents from which the judiciary might induce the principle of the "common law of criminal conspiracy."

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[111] Adam Smith, *The Wealth of Nations* (London, 1826), p. 89; Lipson, *Woollen and Worsted Industry*, p. 122; Webb, *Trade Unionism*, pp. 72, 73; J. L. and Barbara Hammond, *The Town Labourer, 1760-1832* (London, 1917), pp. 60-66; Lipson (*Eco. Hist. of Eng.*, III, 386-392) cites an instance of an injunction issued in 1696 to prosecute employers who entered into combinations directed against their workmen, "as it is said to be done at Colchester." *Cal. State Papers, Domestic, 1696*, p. 205. In People *v.* Melvin, the prosecution denied that the masters' association ever sought to control the workers. *Doc. Hist. of Amer. Indust. Soc.*, III, 133.

[112] *Trial of the Journeymen Cordwainers*, p. 97.

[113] Commons *et al.*, *History of Labour*, I, 108-110; *Doc. Hist. of Amer. Indust. Soc.*, III, 26, 27.

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THE GERMAN BANK INQUIRY

DURING the campaign years preceding the Nazi dictatorship, party orators subjected the German banking system to severe criticism. The strictures made were that the banks had been subservient to international capital, had foisted the slavery of high interest rates on the people, had favored large against small borrowers and had formed a state within a state. The positive program of the party called for the financing of official undertakings through the issue of interest-free obligations. Presumably the interest rate was to play a minor rôle in the new totalitarian state and private banking was to occupy a subordinate position.

As a consequence of this attitude on the part of the party and in consequence too of the developments following the 1931 crisis, a Banking Inquiry Committee was appointed by Hitler which convened for the first time on September 6, 1933. On the 21st of November, the Committee began to hold public and private hearings. In all twenty-seven were held, at which the testimony of 123 witnesses was obtained. Those appearing before the Committee included representatives from university faculties, banks, commerce, industry, agriculture, the crafts and labor groups. The hearings were terminated on December 20, 1933, and the report of the Committee was made public in November 1934.

To provide a suitable background for the Inquiry, the services of bankers and banking theorists were enlisted to prepare separate studies. Twenty-six of these were issued treating of the more important currency and banking problems. Disregarding the occasional references to Nazi ideology, one finds much of scientific value in the different studies and much of an interpretive nature, that can be applied to current developments in the United States. With the thought that certain

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topics would be of interest to American students of banking, the following selective digest was prepared.[1]

The Pre-War Banking System

The study of Dr. Döring, *Rückblick auf die Zeit vor dem Kriege und im Kriege,* logically is in the nature of an introduction to the others and may well be considered first in the series of those selected as of particular interest to the American reader. In sketching the historical development of the German credit economy, particular attention is given to the pre-war period, which is divided into two parts: the first includes the years from the establishment of the Reichsbank on January 1, 1876 to 1895, and the second is the period from 1895 to 1913.

[1] The titles of the separate studies follow: Grüger, Franz, *Wirkungen des Krieges und der Kreigsfolgen auf das deutsche Bankwesen mit einem Rückblick auf die Vorkriegszeit,* Referat I/1; von Bissing, W. M., *Die Schrumpfung des Kapitals und seine Surrogate,* Referat I/2; Walb, Ernst, *Übersetzung und Konkurrenz im deutschen Kreditapparat,* Referat I/3; von Moller, Hans, *Der deutsche Privatbankierstand,* Referat I/4; Deumer, Robert, *Das deutsche Kreditgenossenschaftswesen,* Referat I/5; Neumann, Erich, *Die deutschen Sparkassen,* Referat I/6; Bente, Hermann, *Das Eindringen des Staates und der Kommunen in das Bankwesen,* Referat I/7; Rummel, Hans, *Die Rentabilitätsfrage der Banken, ihre Unkosten und die Kalkulation,* Referat I/8 and II/2; Nordhoff, Karl, *Über die Liquiditätsfrage,* Referat I/9; Fischer, Otto, *Die fehlerhafte Kreditpolitik,* Referat I/10; Tewaag, Carl, *Die Zerrüttung des Geld- und Kapitalmarktes,* Referat I/11; Stucken, Rudolf, *Die Konzentrationsbewegung im deutschen Bankgewerbe und deren Gegenkräfte und die Tendenzen zur Dekonzentration und Spezialisierung,* Referat II/1; Paersch, Fritz, *Massnahmen des Staates hinsichtlich einer Beaufsichtigung und Reglementierung des Bankwesens,* Referat II/3; Haase, Ernst, *Die Krisenmassnahmen des Jahres 1931,* Referat II/4; Witte, Eberhard, *Private Geldschöpfungsversuche,* Referat II/5; Tewaag, Carl, *Versuche zur Beeinflussung des Kapitalmarktes,* Referat II/6; Döring, Franz, *Rückblick auf die Zeit vor dem Kriege und im Kriege,* Referat III/1; Speer, Alfred, *Die Inflationszeit,* Referat III/2; Müller, Friedrich, *Stabilisierung und Sicherung der Währung,* Referat III/3; Puhl, Emil, *Wiederaufbau des Geld- und Kapitalmarktes,* Referat III/4; Nordhoff, Karl, *Die Massnahmen der Reichsbank zur Verbesserung der Publizität, Liquidität und Solidarität der Banken,* Referat III/5; Deumer, Robert, *Die Gesetzgebung des Auslandes auf dem Gebiete der Kreditbanken,* Referat IV/1; *Die Bankenkrisen in England, Frankreich, Italien und den Vereinigten Staaten von Amerika,* Referat IV/2; Krämer, Carl, *Literaturübersicht zu den gegenwärtigen Problemen des Bankwesens,* Referat IV/3. The digest of the German bank reports is in the nature of a by-product of a work treating of banking and currency changes in Europe since 1931, which was begun under the auspices of a Cutting Fellowship.

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The dividing point marks the beginning of the upturn in commodity prices following a long decline of twenty years.

Through the first period the German economy was characterized by a relatively slow, uninterrupted rise from a long depression, by a lack of capital, and by a certain stagnation in technical progress. The Reichsbank made good use of its opportunities through these years of quiet economic development to win for itself a definite place in the German economy. In doing so two serious difficulties were encountered. The first of these arose in connection with the maintenance of the gold standard. The small gold stock of the Reichsbank, taken over from the Prussian State Bank, which amounted initially to 340,000,000 marks, fell to a low point of 150,000,000 marks by 1881. This represented a gold cover for the note issue of only 19 per cent, and it seemed that the gold standard could not be maintained. Fortunately, conditions changed rapidly after that year and the gold stock increased until it reached an average figure for the year 1895 of 705,000,000 marks. The gold cover had risen to 64 per cent.

Through this earlier period the credit policies formulated by the Reichsbank were rendered more difficult of execution through competition from the private note-issuing banks. Their discount rates customarily ruled below those of the central bank. In the course of time the situation changed and the position of the Reichsbank, as the sole bank of issue, was made the supreme. The legal restrictions imposed on the note issues of the private banks greatly increased the proportion issued by the Reichsbank in response to growing monetary needs. By a law enacted in 1899 the private banks of issue were forbidden from underbidding the rates of the central bank.

Coincident with the growing power of the Reichsbank, important changes took place in the field of credit which included: (1) the development of the transfer or Giro system, referred to by German authors as the "cashless means of payment"; (2) the growth of the credit banks; and (3) the emergence of the typical German bank which interested itself not only in commercial loans and the money market but also in long-

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erm financing and the capital market. In the pre-war period he typical German bank, which evoked much praise from oreign observers (including among others Professor Foxweil of England), was a combination of the British deposit banks nd the French banques d'affaires. Many students maintained hat the industrial development of Germany would have been etarded without the assumption of the capital formation functions on the part of the German banks. They were forced to tand in close connection with the capital market and the stock xchanges, through whose assistance the funding of short-term apital advances into long-term loans took place. The closeness of relationship between the bank and capital markets had wo important consequences. In the first place, the question f liquidity became one of the central problems in German anking, and, in the second place, the German banks exerted reater influence upon, and were affected more by, cyclical luctuations than was true in the case of the British deposit anks.[2]

The rapid rise in economic development during the second eriod, from 1895 to 1913, reflected itself in the operations of he Reichsbank. In response to increasing monetary needs the ax-free note contingent of the Reichsbank had to be raised harply. The gold stock continued to increase and by 1913 tood 51 per cent higher than in 1895; holdings of bills of xchange were 98 per cent higher, and the note circulation as 79 per cent higher.

In Dr. Döring's opinion the introduction and promotion of ne check and transfer system which came to be universally mployed in the second period represented the most important re-war development in the credit organization of Germany. he Reichsbank utilized every means to promote its growth. n the early years, the decline in its gold stock and the increase n its note issues were the impelling motives. In 1876 the eichsbank began the establishment of its transfer system by aking over the Giro system of Hamburg, which had long erved as a model. Shortly thereafter, a transfer system was

[2] Grüger, Franz, *Wirkungen des Krieges und der Kreigsfolgen auf das utsche Bankwesen mit einem Rückblick auf die Vorkriegszeit*, Referat I/1, 6.

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established which covered the whole of Germany. By 189(approximately 200, and in 1913 some 476, different places wer involved in the system of local and distance transfers. A further step in the promotion of the cashless means of paymen was the establishment of seven clearing houses in 1883, wher the direct interchange of checks, bills of exchange and othe commercial paper was made possible. By 1913 there wer twenty-four clearing houses in operation.

The growth of the cashless means of payment was a mos important element in increasing the scope of the credit banks Previously credit had been extended mainly in the form o cash advances, and hence the amount which could be grante was related directly to the cash holdings of the lending banl or to the amount of cash it could secure from the Reichsbank With an increased use of the Giro and check systems, bank credi could be expressed in the form of deposit increases. Potentia credit expansibility was thus greatly increased and the nee for cash holdings, relatively as large as those formerly required declined. The cashless means of payments made the bank more independent of the Reichsbank, and its own influence i the Giro system declined after 1908 following the establishmen of competing systems by the savings and coöperative banks.

In the upward sweep of the cycle the use of the cashles means of payment made for over-extensions of credit whicl impaired bank liquidity and made the banks dependent upo the Reichsbank at the time of the crisis. The banks regarde it as their due that the central bank render assistance at suc a time. This particular defect in the German banking syste was first revealed in a striking way in the crisis of 1907-1908 and only the outbreak of war prevented a second crisis.

The very sharp decline in the liquidity of German bank is discussed in another one of the studies by Dr. Karl Nordhoff. This trend is illustrated in the case of the large Berlin banks Their holdings of cash and deposits with note-issuing banks which amounted to 14.6 per cent of total deposits at the en of 1895, fell to 12.5 per cent by the end of 1900, and to 7.. per cent at the end of 1912. Paralleling the downward tren

[3] *Über die Liquiditätsfrage*, Referat I/9.

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1 cash liquidity, was the decline which took place in liquid ssets of first and second grade.

According to Dr. Döring, the other important development 1 the credit organization of Germany taking place in the eriod from 1895 to 1913 was the rise of the great banks hrough the absorption of provincial and private banks and ıe development on their part of far-flung branch systems.[4] 'his change resulted from and stimulated the expansion of he cashless means of payment and influenced to an extraor- inary degree the ability of the Reichsbank to exercise effec- ve credit control. The huge capital funds of the great banks, ıeir foreign connections, and the expanding use of acceptance redits weakened the position of the Reichsbank in the private ıarket, where rates of interest became independent of those stablished by the central bank.

The difficulties encountered by the Reichsbank in the exe- ution of its credit policies also arose from the structural rganization of the great banks which was diametrically oppo- ite to that of the Reichsbank. Even though the Reichsbank t the present time possesses the largest number of branches of ny German bank, authority is decentralized and the district ffices are essentially independent. Local credit advances are ıade on the authority of the district managers who are respon- ble for losses and share in the profits. The fundamental rinciples of the internal organization of the Reichsbank were ıherited from the Prussian State Bank. In the application of ıese, the Reichsbank might be likened to a union of inde- endent regional banks endeavoring to remain in close touch ith the economic life of the respective regions.

Originally the great banks likewise were organized on a ecentralized basis. This remained true as long as the per- ɔnnel of the private banks which were absorbed in the branch ystems remained unchanged. The private banker became the ranch manager. In the course of time the management of ıe branches was assumed by officials foreign to the locality,

[4] Riesser, J., *The German Great Banks and Their Concentration in Connection ith the Economic Development of Germany.* National Monetary Commission Washington, 1911).

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and the tendency towards centralized control became mor marked, reaching completeness in the post-war period.

The growing centralization of control in the case of the grea banks made it more difficult for the Reichsbank to retain it insight into the economic life of the various localities. Th previously existing small or private banks habitually submitte their balance sheets to the managers of the Reichsbank' branches. These officials were in a position to advise wit local bankers and to exercise a beneficial influence. Followin the absorption of the local bank into a branch system, th managers of the Reichsbank's branches no longer came int possession of the balance sheets and hence could exercise littl control over local economic developments which flowere behind the protection of the branch systems. Credit advance more and more took the form of acceptance credits. If th great banks desired to discount the bills of exchange arisin therefrom, they sent them to the central office of the Reichs bank. This practice provided scope for the drawing of financ bills, inasmuch as the head office of the Reichsbank often wa not acquainted with the local concerns in question and wa deceived as to the true nature of the bills. They were ofte drawn for odd amounts, making it appear that they had bee drawn in good faith against actually existing values.[5] Th Reichsbank finally awakened to the dangers involved and fror 1906 to 1908 undertook to rid its portfolio of all finance bill This aspect of the problem was investigated thoroughly in th Inquiry of 1908-1909, which proved more a study of th methods of the Reichsbank than of the German banks.

The quality of credit was impaired not only through inabil ity on the part of the Reichsbank to exercise close local scrutin of credit extensions, but also through intense competitio developing between the great banks. This found expressio in the misuse of acceptance credits, in a lowering of interes rates, in a deterioration in the quality of loans, and in specu lative stock exchange operations. The consequence in 190

[5] The German banks in 1928-1929 resorted to a similar practice in the use c dollar acceptance credits. Beckhart, B. H., *The New York Money Market* (Ne York, 1931-32), vol. III, pp. 322-326.

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/as to render the crisis more acute and dependence on the Reichsbank the greater.

On the whole, Dr. Döring concludes that pre-war discount ate policy had little effect in preventing the over-extensions of redit. In the earlier stages of the cycle, the bank rate was out f touch with the market and hence was not able to prevent ver-expansions. In the crisis the Reichsbank was forced to ssume the consequence of the previous periods of over-expan-on. As the ultimate source of reserve funds it did not dare efuse assistance.

The ineffectiveness of discount rate policy forced the Reichs-ank to develop a mild form of open-market technique. Par-cularly after the fiscal reforms of 1909, holdings of Treasury ills were sold or allowed to mature when such action was onsidered necessary. As another handmaiden to discount ate policy was the development of a systematic *Devisenpolitik* eginning in 1908.

However significant these devices were, they did not enable ie Reichsbank to exercise complete control of the credit system. n consequence, measures were sought, after the crisis of 1907-908, to influence directly the credit policies of German banks. irst of all, the credit banks agreed to publish their balance ieets in a prescribed form every other month. It was hoped iat this would lead to a certain measure of self-control in edit policies. In the second place, and of more importance, as the agreement of the banks to increase their cash and eposited reserves. Progress was being made in this direction ist prior to the outbreak of the war, when all further efforts : increases in reserves were abandoned.

Inflation and the German Banking System

According to Dr. Grüger,[6] the methods followed in war nance resulted in a peculiar relationship between currency flation and issues of war obligations, which involved several ages. In the first instance, new issues of paper money were ised on short-dated credits advanced by the Reichsbank to the overnment. The monetary savings following upon expendi-

[6] Grüger, Franz, *op. cit.*

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tures by the government were then mopped up through issu of war loans. Finally, the proceeds of the loans were used i part to retire the short-dated debts. Inasmuch as money sa ings were not equal to government expenditures, the sequen involved was more in the nature of an ascending spiral than closed circle. In other words, the inflationary effects of th growth in the short-dated debt were not entirely offset throug the issue of war loans purchased from monetary saving though the inflation tempo was retarded.

That confidence in the currency had not been lost was ev denced by the increase in monetary savings and in the gener willingness of the population to undergo sacrifices for th furtherance of the war. The continuance by the Germa people of their habits of thrift resulted from their lack knowledge of inflationary processes,[7] from their expectatic of a successful termination of the war and from the force reduction in consumers' demands which followed the rationin of commodities and the fixing of high prices.

In the post-war inflationary developments, the brakes fo merly operative were removed. Current monetary incon was used to satisfy the pent-up demand for consumption good Confidence in the currency became impaired, and the period hyper-inflation finally set in. This was characterized by rapid increase in transactions-velocity. Each fresh issue paper money induced a more than proportional increase prices. The decline in the external value of the mark, in co sequence of reparation payments, import surpluses and spec lative movements, did not lag behind price movements, as w true through the war period, but rather induced fresh pri increases and further issues of paper money. Another eleme in the decline of the mark was the fact that replacement co rose above current selling prices. At first this was not reco nized as a source of business losses but, when recognized, became a potent cause for further price increases.

In the period of hyper-inflation, riches were measured b debts. Monetary income was quickly used to buy goods an

[7] Regarding this point see: Mises, L., "The Great German Inflation *Economica*, May 1932.

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oreign currencies. The process rapidly became cumulative. Each decline of the mark led to further price increases, a enewed flight from the mark and increased demands for urrency. The printing presses could not keep pace with cur-ency requirements, nor could the Reichsbank have exercised ontrol had it so desired. In terms of gold the currency was uickly becoming worthless.

The sequence of events as depicted through the period of yper-inflation in Germany has long been familiar to American tudents. What is not so familiar was the effect of inflation n the position of the banks. In this connection a most striking levelopment was the decline which took place in the capital unds of banking institutions. In the case of a comparable roup of institutions, the decline in capital stock and reserves ay be indicated as follows: [8]

	Capital Stock	*Published Reserves*
	(amounts in millions of gold marks)	
End of 1913	2,998	741
January 1, 1924	792	238

he fact that any capital and reserves remained after the alance sheets were placed upon a gold basis was due largely o investments in buildings and holdings of foreign currencies.

Even more rapid was the decline which took place in the gold alue of the deposit liabilities of banks. In the case of the arge Berlin banks, eight in 1913 and six in 1924, deposits eclined through the period from 4,852 to 1,058 million marks. he deposits of the savings banks, including savings and iro accounts, fell from 19.1 billion marks to 1.3 billion arks.[9]

Through the war and post-war inflation periods the accept-nce business of the German banks all but disappeared. To n increasing extent prior to the war Germany financed her oreign trade on the basis of her own acceptances. Other con-nental countries, in particular Russia and Austria, made reater use of the mark acceptance in foreign trade finance. he loss of Germany's foreign trade along with the depreci-on of the mark destroyed the status of the mark acceptance.

[8] Grüger, *op. cit.*, p. 12.

[9] *Ibid.*, pp. 14 and 17.

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The use of the acceptance in domestic transactions likewis declined. This had depended upon a fully functioning dis count market as well as upon a close connection between th discount and the capital markets in order that the bills use for financing purposes might be consolidated into long-tern loans.

Important changes likewise took place in the character o bank assets. During the war period the large banks devote all of their energies to the furtherance of war finance. Busi ness firms were not forced to borrow. Government expendi tures had greatly increased their cash position. In the post war inflation period business and industry again sought credi from the banks. The increase in wages, the rise of replacemen costs over selling prices, the speculative demand to take advan tage of the declining purchasing power of the mark wer impelling factors. The notion became prevalent that ther would be no further problem as to the marketability of products The relation between a firm's own capital and its borrowe funds was considered unimportant. The final stabilization o the mark accompanied by balance sheet revaluation, eliminat ing the fictitious paper money profits, gave rise to an intens demand for bank credit to finance current production.

Ownership control over industry by the banks, long a char acteristic feature of the Germany economy, was temporaril broken during the war and post-war inflation periods. Th few stocks issued prior to 1918, confined for the most part t the armament industries and to those engaged in the produc tion of substitute goods, were sold directly to the public instea of to the banks. Through the post-war period, issues of stock increased rapidly, resulting from the conversion of Germa industry to a peace basis and from the depreciation of the mark The public were only too eager to buy these stocks as a hedg against commodity price increases. A complete reversal of th pre-war situation occurred, with the industrialists themselve buying into the banks. A case in point was the control exer cised by Stinnes in the *Berliner Handelsgesellschaft*. Th stabilization of the currency and the losses suffered by th *valuta* capitalists completed the circle. Once more the bank were the senior partners in Germany's industrial organizatio

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Up to the time of stabilization the question of the liquidity of bank assets receded far into the background. The fact that treasury paper could be rediscounted relieved the banks of all responsibility for the maintenance of a liquid position. Even though conservative financial policies are normally suspended through such periods, the ease of access to the Reichsbank was a factor in the increased illiquidity of the banking system. Following the stabilization of the currency, credit needs were large and the banks again began to have recourse to the Reichsbank through the discounting of trade bills until, in April 1924, in order to conserve its own resources, it was forced to institute a policy of credit rationing.

Along with other developments in German banking, two very important structural changes occurred. These included the assumption of banking functions by the official banks and by savings banks and an important concentration movement which began in 1917 and continued through the inflation period. An indication of the growing relative importance of the official and savings banks in the commercial banking field and of the declining importance of the stock banks is given in the accompanying table of changes in holdings of Giro accounts.[10]

GIRO ACCOUNTS
(in millions of marks)

	1913	*End of 1924*
Stock banks	4,153	1,789
Official banks	349	344
Savings banks	65	444

The concentration movement, long a significant trend in the pre-war German banking, but suspended in the first years of the war period, began with renewed vigor in 1917. The victory in the East which seemed to portend great business opportunities in the post-war period was the initiating stimulus. In the post-war period the building up of branch systems by competing institutions proved the driving force. The provincial banks in self-defense organized associations, and in addition many new provincial banks were established only to disappear after stabilization.

[10] Grüger, *op. cit.*, p. 32.

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Post-War Capital Formation

That the German economy stood in dire need of long- and short-term credit was clearly evident at the close of the war.[1] Renovations and improvements were necessary in the production apparatus, agriculture had to be developed and war industries transformed to a peace basis. Not only were savings required to finance these many changes, but *Devisen* were also needed to finance imports of essential raw materials. The terms of the treaty of peace, involving the loss of territory which formerly met certain of Germany's needs for raw materials and food stuffs, along with the trade policies of the victorious nations, increased the unfavorable commodity trade balance and made Germany increasingly dependent upon foreign credits.

From 1919 to 1922 production in the durable goods industries, in consequence of the forced savings resulting from the inflation then taking place, increased more than in the consumption goods industries. The forced savings characteristic of the earlier period were not operative during the years of astronomical price increases. Capital accumulations were drawn upon, the productivity of agricultural lands was exhausted, the liquid resources of the money market were almost entirely wiped out.[12]

Such was the situation confronting Germany at the time of stabilization, when all branches of economic life stood in desperate need of capital funds. Agriculturalists were compelled to seek funds to replenish the fertility of the soil, industrialists to rationalize plant and equipment in order to establish themselves on a competitive basis with foreign nations, the business man to reëstablish his inventory of goods. Inflation had not rid the economy of its borrowing needs. In consequence of the demand for funds, the debt burden rose, and the interest rates prevailing ruled much higher than those in force

[11] Digests of the following studies are presented in this section: Fischer Otto, *Die fehlerhafte Kreditpolitik*, Referat I/10; Tewaag, Carl, *Die Zerrüttung des Geld- und Kapitalmarktes*, Referat I/11; *idem, Versuche zur Beeinflussung des Kapitalmarktes*, Referat II/6; Puhl, Emil, *Wiederaufbau des Geld- und Kapitalmarktes*, Referat III/4.

[12] Grüger, *op. cit.*, pp. 5-10.

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fore the war. It has been estimated that, though aggregate gricultural debts were less in 1929 than in 1913, the interest rden at the higher rates of interest in force was equally high. his situation afforded the Nazi party much ammunition during campaign years when it promised to break the "interest te slavery" of the German people. The fact that interest tes remained high, despite the huge inflow of foreign credits, is itself perplexing and the subject of special treatises by erman economists.[13]

Dr. Tewaag discusses at considerable length the relative portance of foreign and domestic savings and credits in the building of the capital market from 1924 to 1930. Reliance the former was one of the most important developments in e world economy through this period. In so far as internal ans were concerned, Dr. Tewaag differentiates between luntary and forced capital formation. Voluntary capital rmation included the growth of savings accounts, the pre- ums held by life insurance companies, the purchase of fixed- erest-bearing securities by investors, the extension of invest- nt credits by private banks, and the growth taking place bank deposits. Forced capital formation, in the sense used Dr. Tewaag, included that brought about by various social urance laws, the growth in the cash holdings of govern- ntal bodies which sought an outlet on the money market and nplicated considerably the problem of credit control, the dits granted by governmental divisions for housing and for promotion of certain industries such as automobile, ship- lding and banking.[14]

The author notes the various handicaps existing in the way any precise measurement of capital formation. In Germany principal difficulty arose from the possibility of double koning in connection with the ebb and flow of funds between domestic and foreign money markets. For example, no a are available of the amount of German securities floated ernally, which were later purchased by foreigners; nor of amount of German securities floated abroad which were

[13] Especially by the faculty of the University of Freiburg.

[14] Tewaag, *Die Zerrüttung des Geld- und Kapitalmarktes*, p. 10.

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repurchased by Germans; nor of the repatriation of Germ funds formerly held abroad. Even more fundamental was t fact that the inflow of foreign funds prompted a domes credit expansion which later manifested itself, as the cred were utilized, in a growth of savings accounts. In oth words, the increase in savings was a reflection in part of t expansion taking place in the credit volume.

On the basis of various estimates, Dr. Tewaag concludes th voluntary savings on the part of the German people from 19 through 1930 amounted to 30 billion Reichsmarks.[15] Of tl sum, 13 billions were accounted for by the growth in savin deposits, 2 billions by life insurance premium reserves and billions by the amount of fixed-interest-bearing securit purchased directly by German investors. Two qualificatic are made as to the accuracy of these data. In the first pla only a part of the growth in savings accounts could be regard as true savings. Some part of the increase consisted of wo ing capital funds which had been placed with savings insti tions to obtain the higher rate of interest paid and hence co not with safety be placed in long-term securities. In t second place, the data do not include the amount of sto purchased by the public. No data are available of the amo placed with investors and the amount remaining with is houses. The conclusion is reached that perhaps the amo of stocks sold the public would compensate for the amount savings deposits which did not represent true savings.

As rapid as was the increase in savings, which would have been possible without the integrated banking system Germany, there were certain influences working against capi formation.[16] These included, first of all, a survival of inflation psychology. The idea was widely held that it v futile to save and that income should be spent. Apart fr the lack of desire to save was the fact that the earning po of the middle classes which had contributed greatly towa capital formation in the pre-war period was impaired. Thou the economic position of wage-earners had improved, savi from this class to the amount formerly contributed by

[15] *Ibid.*, p. 11.

[16] *Ibid.*, pp. 13-14.

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iiddle classes could not be expected. Savings habits had not een developed. In addition the high wage policy, the social osts and high taxes prevalent in post-war Germany had two esults in so far as business enterprise was concerned. The rofitability of business was reduced, which prevented the uilding up of reserves for plant and investment and for the ridging over of crises. On the other hand, the high wage olicy stimulated the demand for capital funds as firms replaced igh-paid labor with machinery. The demand for long-term inds on this score, Dr. Tewaag declares, was largely met from oroad. If this inflow had not occurred, interest rates would ave been even higher than those prevalent in post-war Ger- iany. There would have been greater reliance on labor and ss on machinery. As it was, the structure of production was ianged, and equilibrium was not attained in the labor iarket.[17]

In the German economy of the post-war period this inflow f foreign credits attracted by the differences in interest rates layed an all-important rôle. These were associated with the ressure to pay reparations and to rationalize German industry i order to win a place in the world export market.[18] The iflux of foreign funds was induced in part by the cheap money olicies followed in foreign centers, particularly in New York, nd prompted by world confidence in the eventual recovery of ermany. The belief was commonly held that there was little mit to Germany's capacity to pay and that the transfer prob- m would be solved and the debt burden lightened through ie secular increases to take place in German exports.

In his study Dr. Fischer states that from 1924 to 1928 the erman government looked with favor upon the inflow of oreign credits.[19] Domestic banks were expected to borrow broad and had they not done so, foreign banks would have een encouraged to establish branches for the purpose of nding directly to German business firms.

[17] Fischer, *op. cit.*, p. 8.

[18] An incidental effect of industrial rationalization was to load industry with igh fixed charges during the depression.

[19] *Op. cit.*, pp. 27-28.

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Emphasis has frequently been given the idea that the effe of the inflow of short-term funds was akin to the establishme of a second central bank which usurped the functions of tl Reichsbank and made the matter of credit control more difficu Data relative to these short-term credits were first made publ in July 1931 and were much larger than generally suppose a fact which, according to Dr. Tewaag, called into questic the statistics previously published of Germany's internation balance of payments.[20] The excess over generally accepte estimates, amounting to about five billion Reichsmarks, w explained as representing the amount of foreign short-ter debts of German business firms as contrasted with those German banks.

The realization that it would not be in the self-interest foreign creditors to withdraw these credits precipitously co vinced German borrowers that they could eventually be co solidated into long-term loans. In this expectation tl German debtors were to be bitterly disappointed. The liqui ity crisis of 1931 led to a quick withdrawal of foreign credi and made their refunding either in the United States or France impossible.

Dr. Tewaag observes that it would have been in the interes of German firms had long-term funds from abroad been secure more through stock flotations and less through bond issue That this was not done was due in part to the fear of an increa ing measure of foreign domination. The growing bonde debt of German industry was responsible for a greater pr portion of inflexible costs during the deflation and made th problem of readjustment more difficult. The point in questic is well illustrated in the case of Dutch corporations, whic financed themselves to a large extent in the post-war perio through the issue of stocks and hence could make quicke readjustment to the deflation.

In conclusion, the authors quoted in this section agree tha capital utilization in post-inflation Germany left much to b desired. Long-term funds seeped into the money market an short-dated funds were directed into long-term uses. Th

[20] Tewaag, *Die Zerrüttung des Geld- und Kapitalmarktes*, p. 19.

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Gold Discount Bank endeavored to bridge the gap between the short- and long-term markets, through the sale of bills in the discount market and the purchase of investments, but apparently without appreciable success.[21] Political subdivisions demanded capital funds without reference to the *sharpness* and tempo of capital formation. No connection existed between these loans and *valuta* production.[22] The obligations floated by political bodies were looked upon as non-productive in being serviced not from an increased productivity of the German economy but from taxes. Official bodies often borrowed at short term from savings banks, loans which became completely frozen after the 1931 crisis. Housing developments were financed on the basis of government subventions at a time when the value of existing houses was being reduced through tax and rent laws. Intensive methods in agriculture were stimulated without assisting the farmer to dispose of his surplus crops.[23] The German business concerns were guilty of paying inordinately large dividends at the expense of sufficient reserves.[24] In so far as the capital market is concerned, Germany's needs in the future, according to Dr. Tewaag, are threefold: sharper capital formation, rational capital apportionment and productive capital utilization.[25] How these aims can be realized under the present trade policies of the Nazi government and the rearmament program remains to be seen.

Developments in German Banking since Stabilization

In a study by Dr. Fisher attention is directed to certain changes taking place in the financial position of the German banks through the post-stabilization period.[26] The first of

[21] Puhl, *op. cit.*, p. 7.

[22] The conviction that foreign borrowings might endanger the position of the German currency, along with the fact that German issues were floated abroad in a disorganized fashion, led early in 1924 to the establishment of the "Beratungsstelle für Auslandskredite". The inexpertness of the control and the fact that short-term loans were not brought under control until 1930 defeated the purpose of this measure. Tewaag, *Versuche zur Beeinflussung des Kapitalmarktes*, p. 6.

[23] Fischer, *op. cit.*, p. 11.

[24] Tewaag, *Die Zerrüttung des Geld- und Kapitalmarktes*, p. 36.

[25] *Ibid.*, p. 38.

[26] Fischer, *op. cit.*

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these was the marked decline which occurred in the proportion of the banks' own funds relative to liabilities. Before the war it had been customary for German banks to maintain a high ratio of capital, published reserves and secret reserves to their liabilities. This was essential, engaged as the institutions were in the promotion of transport and industrial undertakings. Large secret reserves were maintained so that losses might not become a matter of public notice and that a stable dividend policy might be maintained. Indeed German bankers held that the only true reserves were the secret reserves. The decline taking place in the proportion of the banks' own funds in the post-war period is strikingly illustrated in the case of the large Berlin banks. Apart from whatever secret reserves were maintained, the proportion of their capital, reserve funds and profit and loss accounts to their deposit liabilities declined from 32 per cent in 1913 to 8 per cent in 1929.[27]

Of an importance equal to the decline in the proprietorship account of the German banks were the changes taking place in the maturity and ownership of deposit liabilities. Accompanying the rapid increase in deposits from 1925 to 1930, when they reached considerably higher totals than in 1914, an important change took place in their maturity. The proportion of deposits falling due within three months increased and the proportion of those falling due after three months declined.[28]

End of June	Total Deposits (in millions of Reichsmarks)	Per cent falling due in 7 days	Per cent falling due from 7 days to 3 months	Per cent falling due after 3 months
1914	7,607	57.5	23.4	19.1
1925	4,197	54.3	42.8	2.9
1929	11,414	40.9	50.5	8.6
1930	12,751	41.4	51.5	7.1
1933	7,284	48.4	38.9	12.7

So far as the increase in deposits is concerned, the author attributes this to five different sources. The first was the rise in domestic savings deposits. In the pre-war period these

[27] See *Commercial Banks, 1913-1929* (Geneva, League of Nations, 1931), pp. 140-141.

[28] Fischer, *op. cit.*, p. 18.

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constituted the principal source of bank funds employed at long term. That they were of less importance in the post-war years is indicated by the smaller proportion of deposit totals falling due after three months' time. In part this was the consequence of a smaller volume of savings in Germany and, in part, the result of a sharper competition encountered from the official banks, the provincial mortgage banks, municipal savings banks, and Giro centrals. Liquid means that might have been used in the financing of current transactions were diverted into the meeting of the investment credit needs.

Another part of the increase in deposit totals is attributed to the growing use of the check and remittance system. Less cash was maintained by German firms and a larger volume of deposit credits.

Some portion of the deposit expansion simply reflected the volume of credit extended by the banking system. Since 1924 the credit needs of most German firms had been financed on the basis of book credits, following in this respect traditional British practice.

A part of the increase in deposits represented funds realized from the sale of securities at home and abroad which were awaiting use by entrepreneurs.

Finally, and of great importance, was that part which represented foreign deposits attracted to Germany by the high rates of interest paid on time accounts. The increase in these was chiefly responsible for the large proportion of deposits falling due between seven days and three months. At the maximum reached in 1928, foreign deposits amounted to 40 per cent of the total deposit liabilities of the banks.

The situation resulting from the changes occurring in the character of bank deposit liabilities was a precarious one. Savings accounts were not large enough, in view of the decline in the proprietorship account, to finance the investment needs of German business. Foreign deposits were subject to quick withdrawals which would seriously deplete the reserves of the Reichsbank.

Still another development in German banking, particularly since 1925, was an increased reliance on foreign finance bills.

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The acceptance credits utilized often were not true documentary credits. They were not used to finance a specific movement of goods, but served rather to finance the general requirements of exporters and importers and were utilized also to finance the rationalization of German industry. According to the author, this situation was well known abroad by foreign bankers who relied upon the guarantee of the German banks for repayment. The true nature of these acceptances became apparent in the crisis of 1931. Even without the depression, payment could have been effected only through refunding operations and, as it was, they fell subject to the standstill agreements.[29]

The intense demand for long-term funds in post-war Germany and the substitution of credit for capital are evident from the changes taking place in the character of the assets of the German banks. Holdings of long-term paper and syndicate participations increased. Security loans rose rapidly until the Spring of 1927 when stock speculation reached a peak. These various developments reflected the poor functioning of the capital market.

In conclusion, Dr. Fisher indicates that the growing illiquidity of the German banking system arose from the fact that the economic system itself had been deprived of all liquid means. Not only was the position of the banking system endangered through the decline taking place in liquid assets, but its position was made more precarious through the reduction in the published proprietorship account, in the secret reserves and through the increase in the holdings of foreign deposits which were quickly withdrawn at the first hint of growing tension.

State Intervention in the German Banking System

A leading characteristic of the great depression has been the extent of state intervention in the economic system. This has occurred on a scale never before known and has been undertaken to cushion and prevent monetary losses, to peg values to combat the "stickiness" of interest rates, and to prime the industrial pump. Whether such government activities, under-

[29] *Ibid.*, pp. 21-22.

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taken in response to widespread popular demand, have retarded or promoted recovery is a moot question. Beginning with the guarantee by the Austrian government of the liabilities of the *Credit Anstalt,* the first important financial institution to experience the impact of the depression, government intervention in the field of currency and banking has been of particular significance and practically all countries have rendered support to the credit structure in one form or another.

In England, assistance was given by the Bank of England; in France, by the *Caisse des Dépôt et Consignations;* in the United States, by the Reconstruction Finance Corporation, the Home Owners Loan Corporation, the Federal Farm Mortgage Corporation and a host of similar institutions. Germany was no exception to this general rule. The universality of state intervention in banking in this crisis, as contrasted with previous ones, is due in part to the transition from small to large capitalism. In the severe depressions of the 70's and 90's, when banking units were smaller, the failure of one institution affected a limited territory and had no widespread repercussions.

In a discussion of this topic, Dr. Bente [30] indicates that the assumption of banking functions by the state is no new development in Germany, dating from before the advent of modern capitalism. The physiocratic philosophy of laissez faire, widely accepted in English-speaking countries, never commanded the same support in Germany where certain banking functions were generally recognized as the justifiable prerogative of the state. The first of these had to do with the issue of bank notes. That these should be issued by central banks, under the close control or supervision or in close association with the state, has come to be admitted even by those economists who belong to the liberal school. In addition to the control of bank-note issues, state intervention before the war was considered appropriate, if it were necessary to render services not performed by existing financial institutions. This was particularly true in the matter of the caring for and promotion of savings. The concentration movement in German

[30] Bente, Hermann, *Das Eindringen des Staates und der Kommunen in das Bankwesen,* p. 4.

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banking in the pre-war period had eliminated many private banks in smaller localities and brought about a concentration of business in the larger centers. Smaller localities found themselves bereft of savings facilities, with the consequence that political bodies found it necessary to enter this particular field in order to promote capital formation. Savings banks were established under municipal or provincial auspices. Deposits were guaranteed, and tax-exempt privileges given. Such subsidies were considered necessary to promote thrift.

The mortgage credit field was another sphere in which state financial institutions had functioned ever since the establishment of the Silesian Landbank in 1770. In the course of time other state mortgage credit institutions were organized, with the consequence that just prior to the war they dominated the field. According to Dr. Bente this was due to the peculiar rôle of agriculture in a capitalistic economy. Be that as it may, the state land banks rendered important services in giving the farmer direct access to the large investment markets.[31]

Beginning in 1912 state banks first entered the urban mortgage credit field. Their sphere of activity was confined for the most part to small loans. The average mortgage loan of the official banks amounted to 15,000 marks against an average of 36,870 marks for the private institutions.[32]

During the war the organization of official credit institutions received fresh impetus, a movement which continued with increased acceleration in the immediate post-war period. The terms of the treaty of peace, the impoverishment of Germany, the problems involved in currency stabilization, the change in the world economic structure, the weakening banking structure made it necessary to establish banks to render certain services not performed adequately by existing financial institutions. Banks were organized to assist in export financing, in the promotion of housing developments, in the financing of agriculture, in the stabilization of the currency, and in the care

[31] See study by Cahill, J. R., *Agricultural Credit and Cooperation in Germany* (Washington, 1913). Printed as Senate Document No. 17. 63rd Congress, 1st Session.

[32] Bente, *op. cit.*, p. 7.

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of middle-class credit needs. So rapid was the growth of such institutions that the saying became current that each minister of the government had his own bank. Among the institutions established might be mentioned first of all *Reichs-Kredit-Gesellschaft* which was organized initially in 1922 to finance undertakings under government influence. Later it extended its sphere of activity to a general banking business and acted as correspondent for provincial and foreign banks. So expertly have its affairs been managed that it has acquired an excellent reputation in the field of banking. Other state institutions which were established in the post-war period include the *Deutsche Golddiskontbank, Deutsche Verkehrs-Kredit-Bank, Deutsche Bau- und Bondenbank, Bank für deutsche Industrieobligationen, Deutsche Rentenbank, Deutsche Rentenbank-Kreditanstalt* and *Deutsche Siedlungsbank.*[33]

As an additional development, savings banks in the post-war period began to enter the short-term credit field. They permitted the establishment of clearing accounts, financed municipal credit needs and in general competed with the large credit banks.[34]

The post-war situation with reference to state intervention in banking was far different from that existing in the pre-war period. Before the war, official banks served rather a limited field and were restricted to the quiet sectors of German economic life. Their activities were confined to those which would not or could not be assumed by private banks, to those with comparatively little risk as in the rural mortgage credit field, or to those closely associated with the fiscal affairs of the Reich. The remainder of the credit field belonged exclusively to the private banks. The financing of industry, the granting of short-dated credits, the financing of stock exchange transactions—fields in which risks and profits were greater—were entirely in their hands. In the post-war period, official banks were to be found in all parts of the economy, operating directly or through credit banks whose stock they had acquired.

[33] See article entitled "Offentlich-rechtliches Bankwesen" in *Handwörterbuch des Bankwesens* (Berlin, 1933).

[34] Neumann, Erich, *Die deutschen Sparkassen*, Referat I/6.

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In part this tendency was the result of past trends and of contemporaneous political and economic developments and in part too the result of a desire of the post-war governments to enlarge the sphere of state activity.[35]

The breakdown of the German banking system, at the time of the liquidity crisis in 1931, led to further widespread state intervention in order to prevent a complete collapse of the credit machinery. Since the Nazi Revolution, control has been made more complete in order that the banking system might be used as an instrument in the furtherance of the policies of the government.

The crisis intervention of 1931 took two forms: (1) direct support which was accorded the private banks; and (2) the establishment of institutions which could render indirect support to the financial and economic structures.

Direct assistance was initiated by the guarantee on July 13, 1931 by the Reich of the deposits of the *Darmstädter und Nationalbank.*[36] This was followed quickly by purchases of stock in the *Dresdner Bank,* making the government the largest stockholder. The Reich and the *Golddiskontbank* purchased stock in the *Commerzbank,* in the *Deutsche Bank und Diskontgesellschaft* and in the *Allegemeine Deutsche Kreditanstalt* of Leipzig (*Adca*). This last institution received assistance from the state of Saxony. Later the Reich, the *Reichskreditgesellschaft* and the free city of Bremen effected the reorganization of the *Schröderbank.* As further steps in the reconstruction process the *Darmstädter und Nationalbank* was merged with the *Dresdner Bank* in December 1931, and the *Commerz und Privat-Bank* with the *Barmer Bank-Verein,* an important institution in Düsseldorf. In consequence of the crisis of 1931 all of the large Berlin banks with the exception of the *Berliner Handels-Gesellschaft* had been brought directly under the influence of the government.[37]

[35] Bente, *op. cit.*, pp. 16-21.

[36] *Ibid.*, pp. 35-37.

[37] *Commercial Banks, 1925-1933* (Geneva, League of Nations, 1934), pp. 116-118.

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Indirect assistance in the rebuilding of the banking structure was afforded through the establishment of various separate institutions. Among these were:

1) *Die Akzeptbank, A. G.* 1931

Organized in the first instance to lend assistance to the *Danat* and *Dresdner* banks, the functions of the Acceptance Bank were shortly enlarged to enable it to lend aid to all institutions in need of liquid funds. Through its endorsement, two-name paper held by the banks was made acceptable for rediscount at the Reichsbank. In extending such guarantees, the bank worked closely with the Reichsbank and endorsed paper only with its approval. The authorized capital stock of 200,000,000 Reichsmarks was subscribed for by the Reich, by the official banks and by private banks.[38]

2) *Diskont-Kompagnie, A. G.* 1931

This institution was founded to assist in the rebuilding of the discount market through the purchase and sale of trade bills. The authorized capital of 50,000,000 Reichsmarks was subscribed for in part by such official institutions as *die Golddiskontbank, die Bank für Industrieobligationen, die Deutsche Verkehrskredit Bank* and *die Deutsche Girozentrale.*

3) *Die Deutsche Finanzierungsinstitut, A. G.* (*Finag*) 1932

The purpose of this institution was to make bank portfolios more liquid by taking over stocks and securities at a price over and above current stock exchange quotations, usually at par, which had resulted from actual reorganizations or refunding operations. The object in taking over such securities was to prevent losses which would develop if they were sold too rapidly on the stock exchange. Official banks subscribing to the authorized capital included *die Golddiskontbank, die Bank für Industrieobligationen,* and *die Akzeptbank.*

[38] Bente, *op. cit.*, pp. 36 and 58; Haase, Ernst, *Die Krisenmassnahmen des ahres 1931*, pp. 8-10.

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4) *Die Tilgungskasse für gewerbliche Kredite* (*Tilka*) 193:
The amortization institute was to take over debts from small and medium sized banks which otherwise would have to be written off immediately. The banks remained responsible for the debts and were to deliver cash to the *Tilgungskasse* for writing-off purposes amounting to 1½ per cent of the total debts taken over in each of the first four years and ½ per cent per year thereafter. All debts must be liquidated in twenty-five years. The advantage of this arrangement was that banks might continue to maintain their unrealizable assets at their book value in return for a pledge of a part of their future earnings. The institution had simply a guaranty capital of 30,000,000 Reichsmarks guaranteed by the *Golddiskontbank*.[39]

In addition to the direct and indirect assistance given by the government and official banks, two other measures should be mentioned. These included the establishment of the *Überweisungsverband* and the *Bankenkuratorium*. The organization of the first institution grew out of the fact that certain banks were subject to particular mistrust on the part of depositors. Deposits were quickly withdrawn and shifted to other banks, subjecting these institutions to heavy clearing-house drains. To remove the danger from this score, the *Überweisungsverband*, at the suggestion of the Reichsbank, was established with a membership of forty-five institutions and began activities on the 21st of July 1931. Payment of adverse clearing-house balances was permitted to be made in securities lodged with the *Bank des Berliner Kassenvereins*. The value of the securities so pledged was subject to determination by the *Golddiskontbank*.

To cover any losses which might arise, the member institutions established a guaranty fund of 5.9 million Reichsmarks. With the resumption of payments by commercial banks on the 5th of August, the *Überweisungsverband* was abolished and the clearance system was again taken over by the Reichsbank.

[39] *Commercial Banks, 1925-1933*, p. 121; Bente, *op. cit.*, pp. 36-37.

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In the fourteen days of its existence, 92,000 deliveries took place to a total amount of 280.5 million Reichsmarks. This organization performed work analogous to that rendered by the clearing house associations in the United States through the issue of clearing-house loan certificates in periods of crises prior to the establishment of the Federal Reserve System.[40]

The monies advanced to, and the purchase of stock in, various banking concerns led to the organization of a bank inspection service, among other reasons for the purpose of safeguarding the investments of the government. The *Bankenkuratorium* was established on September 19, 1931 by an emergency decree and consisted of five members whose duty it became to supervise and influence general bank policy. The committee took part in the discussions relative to bank assistance, bank mergers and bank management. Through an emergency decree of December 8, 1931, it became involved in the control of interest rates in the money market.[41]

In addition to the assistance rendered the banking community, certain steps were taken to lighten the debt burden through reduction of the debt proper and of the interest rate burden. These are described fully in the study by Dr. Tewaag entitled: *Versuche zur Beeinflussung des Kapitalmarktes.*[42] Such measures of relief as were undertaken were confined mainly to the field of agricultural credit and initially to the agricultural debt burden in East Prussia. Later the remedial actions were extended over the entire domain of agricultural credit. Rates of interest were reduced by an emergency decree of December 8, 1931. Direct interference with contractual relationships in this way led to a sharp decline in the value of mortgage bonds and dried up the sources of long-term agricultural credit. The capital market became unwilling to accept new obligations. The effective rate of interest was raised. Such drastic measures, according to Dr. Tewaag, had an unfortunate effect in diverting funds to the short-term money markets and in making people less eager to save.

[40] Hasse, *op. cit.*, pp. 7-8; *Commercial Banks, 1925-1933*, p. 116.

[41] Hasse, *op. cit.*, p. 8.

[42] Referat II/6, pp. 9-15.

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It was to be expected that the liquidity crisis would lead to a freezing of the short-dated debts of the municipalities. The dangers inherent in the large volume of such debts had been recognized as early as 1929. On the initiative of the municipalities themselves efforts were made to effect a consolidation of the short-dated debts, especially of those incurred for housing developments. This attempt was without success. On October 6, 1931, an emergency decree was issued which looked towards voluntary action on the part of municipalities and their creditors for a refunding of the short-dated debts. The lack of success of such voluntary measures led to the passage of the municipal refunding law of September 21, 1933. This established a Refunding Society which was authorized to issue 4 per cent obligations running for a period of twenty years. Municipalities were given the right to refund their short-dated debts into these obligations. In the event that creditors refused to accept these long-term obligations, payment of the short-term debts was prolonged for a period of five years. At the same time municipalities were forbidden to seek new loans until March 31, 1935.[43]

The developments of the 1931 crisis and the economic and political ideology of the Nazi régime have brought the German credit, capital markets and banking systems under the strict control of the government. In his study Dr. Bente raises the question as to whether the present situation is likely to continue and suggests several alternatives including: (1) the return of banks to private ownership and control; (2) the replacing of the large by small banks also under private control; and (3) a continuation of present state control.[44]

The conclusion is reached that there is no immediate possibility of the first alternative. Private capital does not exist in sufficient volume to replace the amount of state capital employed in banking. Even though private capital might be sufficiently large to be substituted for state capital at some time in the future, it is hardly likely that free competitive capitalism would be tolerated in a totalitarian economy.

[43] *Ibid.*, p. 13.

[44] *Ibid.*, pp. 38-45.

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Nor would it be feasible, Dr. Bente continues, to follow the cond suggestion and break up the large bank into a large ımber of small units. This would presuppose that business ;elf would be so broken up, and, with smaller producing units, e standard of life of the German people would decline. ertain banking functions such as the financing of small busi- ss concerns and the extension of personal credits might well assumed by savings and coöperative banks, thus delineating e fields of operation, but there could be no widespread sub- itution of small for large banks.

The conclusion is reached that the present situation of mixed ivate and state banks will not continue indefinitely and that e real question at stake is between large banks under private vnership as opposed to large banks managed by the state. ıe solution of this problem, Dr. Bente suggests, does not volve around the matter of bureaucratic control. Private nks might develop bureaucratic tendencies and did so in eir process of growth as management passed from the hands those who were bankers to those who regarded their principal nction as that of managing large fortunes. State banks, on e other hand, as illustrated in the case of the *Reichskredit- sellschaft,* might be managed in accordance with the best inciples. The real issues at stake relative to the desirability private versus state banking concern themselves with the llowing questions: the matter of relative cost, the degree of öperation given the aims of the state, the preventing of maging cyclical fluctuations, the matter of selective financ- g, and the promotion of desirable economic aims.

The report of the Commission to inquire into the German nking system was published in November 1934. The prin- ɔal recommendations made included: (1) government control d supervision of credit institutions; (2) the maintenance of equate liquidity ratios; (3) a sharp differentiation between ɔney market and capital market activities; (4) the control of e check and remittance system by the Reichsbank; (5) a centralization of the credit system wherever possible; (6) an creased ratio of net worth to deposit liabilities; (7) estab-

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lishment of maximum limits on loan extensions; (8) greate publicity relative to bank balance sheets; and (9) the estat lishment of a supervisory office for banks under the chairmar ship of the president of the Reichsbank.[45]

On December 5, 1934, the cabinet approved a decree puttin these recommendations into force. Commercial bank reserv are to be built up over a period of time to 10 per cent of depos liabilities. A further reserve of 30 per cent in liquid secur ties is to be held and net worth must be raised to equal 20 p cent of the liabilities of the commercial banks. Investmen in real estate and permanent participations together are to b limited to the amount of the banks' capital.[46]

Laudable as are these provisions, they represent idealist aims rather than anything that can be achieved practicall The portfolio position of the German banks at present is er dangered, as is that of the American banks, through the nece sity of financing the deficits of the Reich and through the di counting of work-creation bills. No exact data exist of th growth in the deficit of the German government, but that is sufficiently large to cause serious concern admits of no doub Whether the inflation resulting therefrom can be held in chec remains to be seen.

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[45] *Commercial Banks, 1929-1934* (Geneva, League of Nations, 1935), pp. 50-5

[46] A translation of the decree may be found in the *Federal Reserve Bulleti* January 1935. The decree became effective January 1, 1935. See "The Ge man Bank Act of 1934", by Marie Dessauer, *The Review of Economic Studi* June 1935.

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RECENT STUDIES ON CHINESE LAW

STUDIES in the field of Chinese administrative and legal institutions in recent years reveal an increasing interest on the part of Chinese, Japanese and Western scholars. The amount of work achieved, employing the methods of modern critical historical research, constitutes as yet but a slight beginning in what is still a largely unworked field. Such work as has been accomplished, however, clearly indicates the potential contributions which further researches can make to our understanding of the evolution of Chinese social, economic and political life and institutions.

It was Gibbon who wrote at one time that the laws of a nation form the most instructive portion of its history. Law in Chinese society, as in any civilization, is the product of the clash between the fundamental economic and social forces operating in that society and its philosophical ideals and religious beliefs and practices. All of these forces condition the administrative and judicial codes, regulations and political institutions established by the ruling class. The law, both public and private, then, is the result of these conflicting forces and provides a reliable "norm" by which to judge the strength and nature of these forces in a society at any particular time, or from time to time. An examination of some of the studies listed below will demonstrate to the social and economic historian of China the value, indeed the necessity, of consulting the codes, the case materials and the memorials, decrees and commentaries which bear upon the law, its interpretation and administration. For the general historian to abandon the field entirely to the specialist in legal history or comparative law is to overlook a rich source from which to derive a more realistic appraisal of the forces actually at work in Chinese society at different epochs than is frequently to be secured from a study of the philosophical texts or the formalized and "approved" official histories.

It is the purpose of this article to summarize the nature and extent of the research which has been accomplished in this subject in the course of the past fifty years on the part of Chinese, Japanese and Western scholars, and to present some general remarks on the nature of the available materials for further research in the field. Much of the earlier investigation was unsystematic, some periods receiving

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considerable though in no case adequate attention, as for exampl the period prior to the founding of the Empire (c. 250 B. C.), tl T'ang period (618-906 A. D.), and the Ch'ing period (1644-1911 The intervening periods, equally important from many points view, have been almost wholly neglected. The quality of the wo has been very uneven, and in what follows an attempt will be ma to separate the wheat from the chaff.

An outstanding historic development, conditioning the attitude t ward and interest in Chinese law on the part of both the Chine and Westerners, was the rise of the extraterritorial régime after 184 This emerged, in the ultimate analysis, out of the contrasting conce tions in the West and in China of the function of law in societ The conflict became acute in homicide cases which resulted from t contacts between foreigners and Chinese at Canton in the pre-trea days. What the Westerners found especially repugnant in Chine law was not only the application of the death penalty in a clear ca of homicide,[1] but also the application on the part of the Chine officials of the highly developed doctrine of responsibility, which he that the captain of a vessel, or an official, was liable for the act of subordinate, and that all the members of a particular nationality we responsible for the offenses committed by any one among them. Th concept seemed to the individualized Westerner, and his equally i dividualized law, highly unreasonable. Likewise abhorrent to t Westerner, whose law was only then passing through a process humanization accompanied by mitigation of punishments and improv ment of prisons, were the penal character of all Chinese law both ci and criminal, the application of torture during trial, the unsanita conditions obtaining in the prisons, and the cruel treatment of priso ers. The attitudes engendered in this conflict, which led to the su cessful establishment of extraterritoriality, created in the West general conception of Chinese law as a type which, if not barbar was at best primitive or undeveloped. During the nineteenth centu this no doubt hindered the development of the study of the law the part of Westerners, with certain notable exceptions to be discuss below.

On the other hand modern Chinese, who regard the persistence the extraterritorial régime as an infringement upon their natior sovereignty, have been much more interested in promulgating coc

[1] At times the local officials, in accordance with an edict issued in 1749 wh demanded a life for a life in order to overawe the unruly "barbarians", ceeded penalties imposed in the code.

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modeled upon those in the West in order to meet the conditions which the Western powers have laid down by treaty, which must be fulfilled before they will consent to the relinquishment of their extraterritorial rights. The Chinese consequently have neglected the study of their old law and have failed to take due cognizance of it in drawing up their new codes. There is one exception to this generalization: namely, during the initial period of modern codification in the last years of the Manchu dynasty when an attempt was made to adapt Western law to the Chinese social and economic milieu.

The striking contrast in the attitudes of Europeans toward Chinese law, before and after 1750, merits some preliminary consideration. A majority of the European travelers and missionaries to China, as well as writers upon China down to the middle of the eighteenth century, commented favorably upon Chinese law and its administration, as they did upon many other features of Chinese institutional and cultural life. Thus Juan Gonsalez de Mendoza in his work (published in English in 1588) cites the anonymous account of a Christian monk, who had been held captive in China for a time, to the effect that "The sentences which the officers pronounce are conformable to the laws of the kingdom; they judge according to the truth of the matter, which they inquire into themselves without taking account of what the parties say; and so they are very correct in affairs of justice for fear of the visitation (of commissioners on tour from Peking) which they say is made every six months." Galeoti Pereyra, likewise, despite the fact that he was held captive in China, emphatically asserts that justice is done in China and holds it to be one of the best governed countries in the world. Mendoza states that the reason higher provincial officials are not permitted to serve in their native provinces is "to prevent the inconvenience that might happen in the executing of good justice, which many times chanceth, either for the love of his friends and kinsfolk, or else for the hate he hath to his enemies." [2]

By way of summary Hudson writes, "What seems to have struck the sixteenth century observers as most remarkable in the operation of the Chinese law was the system of reviewing cases in which a death sentence had been pronounced." However, he adds, "There is no endeavor in these accounts to minimize the cruelties of the Chinese law—the horror of the prisons, the use of torture and the prevalence of punishments by the use of flogging." [3] Yet even Chinese prisons could be favorably compared with the prisons of

[2] Hudson, G. F., *Europe and China* (London, 1931), pp. 241-244.

[3] *Ibid.*, pp. 244-245.

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Europe of that period. Du Halde writing in this connection asserts: "These prisons are neither so dreadful nor so loathsome as the prisons of Europe, but are much more convenient and spacious . . . ." [4]

Toward the end of the eighteenth century there occurred a marked change in the European attitude toward Chinese institutions. With the decline of missionary activities consequent upon the issuance of persecution edicts in the first quarter of the century, accompanied by increasing commercial contacts, there was substituted for the attitude of praise and admiration of things Chinese indifference if not outright denunciation. Changed conditions in Europe also contributed to this development. With respect to law we find that, accompanying the humanization of codes in Europe and the improvement in the administration of justice, there was a growing dislike on the part of traders in China to submit to Chinese laws. The gross miscarriage of justice in a number of homicide cases such as the Lady Hughes case in 1784 and the Terranova case in 1821 contributed to a demand for an extension of extraterritoriality to cover all cases. After 1842 Western nations were to secure this privilege through treaties forced upon the Chinese government by the various countries primarily interested in the China trade. The desire on the part of vested interests in China to retain these privileges has been the source of much adverse criticism of Chinese law, which was by no means confined to commercial circles, and a consequent indifference to its inherent merits and its rôle in conditioning the evolution of Chinese economic and social institutions.

In this period after 1840, however, the study of the law, that went beyond the descriptions of opinions of early missionaries and travelers, was to begin. Interestingly enough, those who studied it the most found much in it deserving attention. Such, for example, was the experience of Sir George Staunton and Ernest Alabaster. The former, in the preface to his translation of the principal provisions of the Ch'ing code, after acknowledging the fact that in China a man is held guilty until he is proved innocent, writes, "it will scarcely escape observation, that there are parts of the code which, in a considerable degree, compensate these and similar defects, are altogether of a different complexion, and are not even unworthy of imitation, even among the fortunate and enlightened nations of the West." [5]

[4] Du Halde, P., *History of China* (London, 1736), vol. II, p. 224.

[5] *Ta Tsing Leu Lee* (London, 1810), p. xxiv. Staunton translated only a few of the supplementary laws (*li*), which were really the enforced measures and

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A reviewer of Staunton's translation writing in the *Edinburgh Review* (August 1810) described the Chinese code as being clear and businesslike and stated that "we scarcely know any European code that is at once so copious and so consistent, or that is nearly so free from intricacy, bigotry and fiction." The extent of European interest in the code is partially disclosed by the fact that there was sufficient demand for Staunton's work to result in French and Italian translations in 1812.

Furthermore, Ernest Alabaster, who published Sir Chaloner Alabaster's studies on Chinese criminal law, ventured the opinion in 1899 that the "Code when its procedure is understood is infinitely more exact and satisfactory than our system and very far from being the barbarous, cruel abomination it is generally held to be." [6]

In recent years Western jurists have been impressed with the advanced development of many Chinese legal principles and instruments. Thus Dean Wigmore of the Northwestern University Law School writes that "the Torrens method of registering title to land (instead of merely recording deeds), though new among us has been

served to interpret the general principles embodied in the main provisions (*lü*). The first translation of the code into a Western language appears to have been made by Alexis Leontieff, which Henri Cordier in his *Bibliotheca Sinica* lists as a one-volume work on the penal code of the Chinese published at St. Petersburg in 1781. It was a translation made by order of Catherine II from the original Manchu published in 1725. A. F. Povorinskii, in his *Systematic Index of Russian Literature on the Civil Code* (in Russian, St. Petersburg, 1904, Item 1890), states that it was published in two parts by the Imperial Academy of Sciences in 1778-9. P. G. von Möllendorf in his "Essay on Manchu Literature" (*Journal of the North China Branch of the Royal Asiatic Society*, vol. XXIV, 1890, pp. 1-45) states that the Ch'ing code was translated into Manchu in 1644 under the title *Dai Ching Gurun i Fafun* in 12 vols. or *pên*, that it was first published in 1646 and that a new edition appeared in 1766. (See item 171.) Leontieff appears to have published in 1781-83 in 3 vols. a translation from the Manchu of the Institutes of the Ch'ing dynasty (*Ta Ch'ing Hui Tien*) which appeared in China in 1694 with a new edition in 1764.

[6] Alabaster, Ernest, *Notes and Commentaries on Chinese Criminal Law and Cognate Topics* (London, 1899), pp. lxii, lxiii. John M. Zane in his *The Story of Law* (1927) characterizes Chinese law as being half barbarous (p. 441). No doubt this conception is still widely held. It stems from the provisions in the code which permitted the application of torture to extract evidence and the attachment to every clause in the law, whether of a civil or criminal character, of a provision for a certain number of blows of the bamboo according to the nature and severity of the crime. Little if any cognizance was taken of the elaborate tables attached to the Ming and Ch'ing codes which provided for the redemption of this physical punishment by the payment of fines. The practice goes back many centuries.

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in force in China for at least 150 years. Every Chinese land-owner has his official certificate of title, which is indispensable." [7]

Likewise, it is interesting to note that as early as the beginning of the Christian era there were attempts to prevent usury through the regulation by law of the rate of interest, and that for over 700 years since the Yüan dynasty the maximum rate of interest on short-term consumptive loans was fixed at 3 per cent a month. The rate for a similar type of loan fixed by law in several states of this country is 3.5 per cent at the present time, while in England the courts do not as a rule regard 4 to 5 per cent too high a rate for this type of unsecured loan. In addition Chinese law went further and stipulated that the amount of the interest should never exceed the capital regardless of the length of the time which elapsed before the repayment of the loan. In the field of international law China has possibly something to contribute. Thus Professor John B. Whitton of Princeton University in a recent study on "The Sanctity of Treaties" stated that Confucius along with Socrates, Plato and Cicero considered the rule *pacta sunt servanda* as a "categorical imperative of human society", and concluded his study with the statement that "The States of the world, as well as their citizens, must admit, with Confucius, that a State's highest and most sacred interest is its reputation for good faith." [8]

The French seizure of Annam in the latter half of the nineteenth century led to the necessity of studying the native codes for administrative purposes. These codes were derived almost verbatim from the Chinese codes of the T'ang and the Ch'ing dynasties. Thus we have Aubaret's and Philastre's translations of the code in force a

[7] Wigmore, John H., *A Panorama of the World's Legal Systems* (3 vols St. Paul, 1928), vol. I, p. 174. The section devoted to China in this work (vol. I, pp. 141-205) is highly suggestive.

[8] Whitton, John B., "The Sanctity of Treaties", *International Conciliation* October 1935, pp. 397, 429. Also see below, p. 137. The subject of the development of international law in ancient China appears to have been first considered among Westerners by W. A. P. Martin, the translator into Chinese of Wheaton's *Elements of International Law*. He presented a paper on the subject before the Congress of Orientalists in Berlin in 1881, which was later published in a revised form in his *Lore of Cathay* (London, 1901). There appears also in the same volume a discussion of "Diplomacy in Ancient China". A more recent study is the one by Dr. Roswell S. Britton, "Chinese Interstate Intercourse before 700 B. C." in the *American Journal of International Law*, vol. 29, no. 4, Oct. 1935, pp. 616-635. For additional bibliography consult his article. A number of Chinese and Japanese scholars have also written upon the subject.

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the time of the French occupation, which was based upon the Ch'ing code.[9] Then there is also Deloustal's translation of an earlier Annamite code which relied almost wholly upon the T'ang code.[10] At the same time that Deloustal was translating this code Professor Pelliot prepared a very valuable bibliography on Chinese law which, though incomplete in the light of subsequent research and publication, still remains the best bibliography on the subject in any Western language.[11]

Missionaries and government officials have been led to a study of Chinese law that they might better carry on their work with the Chinese. Hence it is not surprising that some of the best work by Westerners in this field has been done by members of these two groups. It has already been noted that Alexis Leontieff's first translation of the codes and institutes of the Ch'ing dynasty was done at the instigation of the Russian government which was seeking to establish closer trading relations with the Chinese Empire. Sir George T. Staunton had his interest aroused in things Chinese as Lord Macartney's page on the latter's mission to the Court at Peking in 1793. The problems arising out of the efforts of the Chinese officials to apply their laws to the Westerners in China, and the opposition of the foreigners thereto, early led him to an interest in Chinese law and the translation in 1810 of the main provisions of the Ch'ing code. Eighty years later the Jesuit Père Guy Boulais completed a full

[9] Aubaret, G., *Code annamite, lois et réglements du royaume d'Annam* (2 Tomes, Paris, 1865); Philastre, P. L. F., *Le code annamite* (2 Tomes, Paris, 1876).

[10] Deloustal, M. R., "La justice dans l'ancien Annam", *Bulletin d'École Française d'Extrême-Orient* (Hanoi, 1908-13, 1919, 1922), Tomes VIII to XIII, XIX and XXII. This is virtually a translation of the T'ang code, and the translator indicates wherein the Annam code differs from that of the T'ang. The translation is not without its errors, but is of value as being the only Western translation of that code. For additional bibliography relating to Annam law see "Bibliographie annamite" by E. Gaspardone in the same journal, Tome XXXIV (1934), pp. 35-47.

[11] Pelliot, Paul, "Notes de bibliographie chinoise II: Le droit chinois", *Bulletin de l'École Française d'Extrême-Orient* (Hanoi, 1909), Tome IX, pp. 27-56. Another suggestive bibliography is that compiled by the Commission for the Investigation of Extraterritoriality at Peking in 1926 under the title *Bibliography of books, articles and other publications relating to the laws, jurisprudence and judicial organization of China.* A more comprehensive bibliography is to be found in Jean Escarra's *Le Droit chinois* (Peiping, 1936), pp. 465-516.

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translation of that code, just before his death.[12] The manuscript, however, was not published until 1923.

A valuable systematic study of Chinese law in the nineteenth century was made by Sir Chaloner Alabaster of the British Consular Service. His work was published with additional material by Ernest Alabaster of the Chinese Maritime Customs Service.[13]

Other suggestive studies by government officials are those by G. Jamieson for a long time in the British Consular Service and T. R. Jernigan formerly of the American Consular Service.[14]

The standard work on medical jurisprudence of the Chinese, known as the *Hsi Yüan Lu,* attracted the attention of a number of Westerners, and parts of it were translated into French and English.[15]

Also in the last quarter of the nineteenth century E. H. Parker of the British Consular Service and P. G. von Möllendorf of the Chinese Customs Service published articles on comparative Chinese family law, which reflect the growing interest in comparative legal studies emerging at the time in Europe under the stimulus of the work in historical jurisprudence by Sir Henry Maine in England and in comparative law in general by J. Kohler and A. H. Post on the continent.[16]

The broadened perspectives which the newly opened field of comparative law disclosed in the latter half of the nineteenth century

[12] Boulais, P. Guy, *Manuel du code chinois* (2 vols., Shanghai, 1923-24). In addition to translating the principal and supplementary laws he translated case materials illustrative of the application of the provisions of the code.

[13] Alabaster, *op. cit.* One very striking error in it is the comment (p. xli) that "It is very questionable whether a code in the proper sense existed before Yung Lo of the Ming dynasty." He apparently had not seen a copy of a T'ang code promulgated seven centuries earlier.

[14] Jamieson, G., *Chinese Family and Commercial Law* (Shanghai, 1921); Jernigan, T. R., *China in Law and Commerce* (New York, 1905).

[15] Martin, Dr. Ernest, "Exposé des principaux passages contenus dans le Si-Yuen-Lu", *Revue d'Extrême-Orient,* 1882, no. 3, pp. 333-380; no. 4, pp. 596-625. Giles, H. A., "The Hsi Yüan Lu, or Instructions to Coroners", *China Review,* III, 1874-5, pp. 30-38, 92-99, 159-172. Also see *Proc. Roy. Soc. Med.,* London, 1923-4, XVII, sec. Hist. Med., 59-107. This is a translation of the first two of the four chapters of the work.

[16] Parker, E. H., "Comparative Chinese Family Law", *China Review,* VIII, 1879, pp. 67-107; von Möllendorf, P. G., "The Family Law of the Chinese and its relation with that of other countries", *Journal of the North China Branch of the Royal Asiatic Society,* XIII, 1879, pp. 99-121; XXVII, 1893, pp. 131-190. Both journals contain many other articles on Chinese law of varying length and quality.

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called to the attention of European scholars for the first time the importance of studying Chinese law. This is evidenced by the publication of studies relating to the subject by Post, Kohler and Plath in Germany, Andreozzi in Italy and, in the present century, by Escarra in France and Wigmore in the United States.[17] Their essays are of interest as a phase in the development of the study of Chinese jurisprudence by Western scholars, despite the fact that much of their work (Escarra's excepted) will have to be rejected. This is due either to their faulty use of the comparative method, as for example Post who compared the highly evolved Ch'ing code with the emerging laws of primitive tribes, or to the fact that they based their work on inadequate and faultily translated materials. Escarra in his two articles on the subject has presented an excellent introduction to the methods to be employed in making a comparative study of Chinese law and has suggested the contributions which such researches will make to the whole field of comparative jurisprudence.

A study which merits special mention here is that by Abram Lind on Chinese commercial law, since it was the work of a man trained both in law and in the Chinese language.[18] His careful definition of terms, and cautious comparison with and use of Western legal terminology, stands in marked contrast to the frequently careless use of terminology by Western Sinologues, untrained in law, or by Western jurists, untrained in Chinese and perforce having to rely upon inaccurate translations. In the future the fullest significance can be derived from the study of Chinese law only by those scholars trained both in the Chinese language and in the field of law in general, or through coöperation between the Sinologue and the student of law.

Mongol law has been of especial interest to Russians possibly because of the problems arising from contacts with the Mongols in

[17] Plath, J. H., "Gesetz und Recht im alten China", *Abhandlungen der Ak. der Wiss.*, I kl., X bd., III abtheil. (München, 1865); Post, A. H., *Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis* (Oldenburg, 1881); Kohler, J., *Das Chinesische Strafrecht* (Würzburg, 1886); *idem, Rechtsvergleichende Studien: Ueber das chinesische Recht* (Berlin, 1889), pp. 179-208; Andreozzi, Alfonzo, *Le leggi penali degli Antichi Cinesi: Discorso proemiale sul diritto e sui limiti del punire* (Firenze, 1878). This work includes a partial translation of the monograph on law in the *Ch'ien Han Shu;* Wigmore, John Henry, *A Panorama of the World's Legal Systems* (3 vols., St. Paul, 1928); Escarra, Jean, *Chinese Law and Comparative Jurisprudence* (Tientsin, 1926); *idem*, "Western Methods of Research into Chinese Law", *Chinese Social and Political Science Review*, Jan. 1924, pp. 227-248.

[18] Lind, Abram, *A Chapter of the Chinese Penal Code* (Leiden, 1887).

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Siberia.[19] The result of work in this field has been brought together and systematized by Curt Alinge.[20] While on the subject of the Mongols it may be well to mention at this point that Paul Ratchnevsky is about to publish, if it has not already appeared, a study of Chinese law under the Mongol dynasty based upon the monograph on law in the Yüan dynastic history. This is, of course, a study of Chinese law as administered under the Mongols and not of the law of the Mongols themselves.

Finally, of prime interest and importance is the study of Chinese philosophy as a background for arriving at the Chinese conceptions of the function of law in society, which are so strikingly and fundamentally at variance with prevailing Western conceptions of law and society. A splendid introduction to this phase is Jean Escarra's stimulating and highly suggestive study on the subject.[21] The bibliographical items cited in his notes cover well the pertinent translated materials. Escarra, in collaboration with Robert Germain, has translated a portion of a work by Liang Ch'i-ch'ao which is cited below.[22] Of especial value in this connection is Professor J. J. L. Duyvendak's introduction to, and translation of, one of the classical works of China's legal school.[23] Dr. Ivanov's translation of the work of another eminent Chinese jurist, Han Fei-tzu, leaves much to be desired in the way of accurate rendering and critical use of the text, as Professor Pelliot has indicated.[24] An excellent account of

[19] Riasanovsky, V. A., *Customary Law of the Mongol Tribes* (Harbin, 1929); *idem, Mongol Law* (in Russian, Harbin, 1931); *idem*, "Influence of Chinese Law upon Mongolian Law", *Chinese Social and Political Science Review*, Oct. 1931, pp. 402-421, and "Mongol and Chinese Law in the Yüan Dynasty", *ibid.*, July 1936, pp. 266-289.

[20] Alinge, Curt, *Mongolische Gesetze: Darstellung des geschriebenen mongolischen Rechts* (Leipziger rechtswissenschaftliche Studien, Heft 87, 1934). Reviewed by A. Arthur Schiller in *Pacific Affairs*, Sept. 1935, pp. 372-374.

[21] Escarra, Jean, "La conception chinoise du droit", Extrait des *Archives de philosophie du droit*, Nos. 1-2 de 1935. This article is reprinted in his *Le Droit chinois*. Also see his article on Chinese law in the *Encyclopedia of the Social Sciences*.

[22] Escarra, Jean, and Germain, Robert, *La conception de la loi et les théories des légistes à la veille des Ts'in* (Peking, 1926).

[23] Duyvendak, J. J. L., *The Book of Lord Shang: A Classic of the Chinese School of Law* (London, 1928); *idem*, "Étude de philosophie chinoise", *Revue Philosophique de la France et de l'Étranger*, vol. 110, 1930, pp. 372-417.

[24] Ivanov, A., "Materialy po Kitaiskoi philosophii. . . . Khan, Pheiizy", *Perevod* (Izdaniia Fakoulteta Vost. Jazykov Imper. S. Peterb. Ouniversiteta, No. 39). A partial translation of Han Fei-tzu, 1912. For a criticism of this work see Professor Pelliot's review in *Journal Asiatique*, 1913, pp. 401-423.

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:he important rôle played by the officials and jurists belonging to the Legal School (*Fa Chia*) of ancient China in the founding of the Chinese Empire may be found in the recently completed study by M. S. Bates.[25]

The studies by Chinese on the law of the Empire, published in the :ourse of the past half-century, while considerable in point of num-)er, vary widely in method of treatment and in value. Those which nake critical use of original materials with a view to tracing the :volution of specific laws or customs, or which undertake to make :omparisons with other legal systems, form the great exception. These studies as a whole fall readily into two categories determined)y the background and training of the authors. There is the group)f studies by older Chinese scholars who have had little, if any, con-act with Western methods of historical research or acquaintance vith legal systems other than their own; and there is the group of tudies prepared by students of the modern generation, brought up nder the influence of Western methods of research, who possess a .odding acquaintance at least with Western law, particularly as it xists today.

The greater bulk of the more enduring work thus far accomplished as been done by members of the first group. The failure of the 10dern group to achieve results commensurate with the work of the lder generation may be attributed to three outstanding circumstances. n the first place, insufficient time has elapsed to produce in this eld mature scholars employing modern methods of research. In the :cond place, the lack of interest in the old law on the part of con-:mporary Chinese is retarding the development of such mature :holars. Finally, the law schools of the land provide few, if any,)urses or training seminars relating to the law of the *ancien régime*.[26] 'he time of the students is taken up with courses designed to fit them) practice in modern courts of law where, it is assumed, the exces-vely Westernized codes at present in vogue will be applied. The esire of the Chinese to meet the conditions laid down by the West-n nations as a prerequisite for the rendition of extraterritoriality, ; well as the general desire to modernize China's social institutions 1d customs, explains in large measure this current transitory situa-

[25] Bates, M. S., "Establishment of the Chinese Empire". A dissertation :esented to the Faculty of the Graduate School of Yale University, 1935. Not :t published.

[26] For a survey of legal education in China today consult Jean Escarra, *Le roit chinois*, pp. 343-431.

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tion. It requires no great amount of courage to prophesy that time will rectify this situation as it becomes more and more apparent that the over-Westernized codes, which have been drawn up in recent years, cannot be applied in the face of the still virile social and economic customs and practices which have survived from the past. Indeed, a renewed interest in the old laws and customs on the part of the younger generation has recently appeared and there are signs that the study of the laws of the Empire will eventually find a place in the law schools and universities of the land.

The years just prior to and following the modern period of codification in China at the opening of the present century witnessed the publication, on the part of the traditionally trained scholars, of a number of invaluable works. The stimulus no doubt originated in the desire on the part of the officials of the time to promulgate a series of codes which would embody the best features of Western and Chinese law for modern China. These works comprise the republication of former dynastic codes or the compilation of historical materials designed to illustrate the evolution of the laws. On the basis of these materials an attempt was made in 1908 to win over the Court and conservative officials by disclosing to them the evolution of the principal clauses in the old codes through the centuries to convince them that the ancients had altered the laws to suit the conditions of the times and thereby had established a precedent for modern codification. The work was especially designed for the eye of the Court and the high officials of the land, and this point of view is clearly and forcibly put forth in its preface.[27]

New editions of former codes which have appeared are the T'ang code in 1890, the Ming code in 1908 and the publication, for the first time in recent centuries, of what may be called the codes of the Sung dynasty in 1918 and of the Yüan dynasty in 1920.[28] The National Library of Peking is publishing a photolithographic reproduction of its manuscript of the *Sung Hui Yao Kao* (draft copy of the institute of the Sung dynasty [960-1280]) which will comprise some two hundred volumes of material throwing additional light on Sung administrative and penal law.

As the codes of the dynasties preceding the T'ang have long since been lost, efforts were made to reconstruct these codes as completely as possible from other extant materials. These efforts culminated in

[27] *Ta Ch'ing Hsing Lü Fen Tse Ts'ao An* (Peking, 1908).

[28] *T'ang Lü Shu I; Ming Lü Chi Chieh Fu Li; Sung Hsing T'ung; Yüan Sheng Cheng Kuo Ch'ao Tien Chang.*

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the splendid work of Ch'eng Shu-teh, who succeeded in bringing together the fragments of the codes of the nine dynasties from the Han to the T'ang (c. 206 B. C.-618 A. D.).[29]

The outstanding man guiding the efforts at modernization of Chinese law in this initial period was Shen Chia-pen, one of the foremost jurists of modern China. He was entrusted with some of the most important official positions in the government. The greater portion of the results of his years of study of the old law were published after his death in 1913.[30] His comments and the materials which he has gathered together in this large collection are of indispensable aid to every scholar in the field. Likewise of value is the general discussion of Chinese law, including a comparison of its fundamental principles with those of Western law, by Ch'eng Shu-teh.[31]

Another prominent jurist of the old school who served for a considerable period of time in the nineteenth century as President of the Board of Punishments was Hsüeh Yün-sheng. Two works of his, containing significant material for the student of Chinese law, have been published. One is on the Ch'ing dynasty code wherein he has carefully set forth the successive alterations (with dates) made in the *Li* or supplementary laws from the beginning of Manchu rule in 1644. He has likewise indicated the alterations made by the Ch'ing dynasty when it took over the preceding Ming code. His work thus serves as a guide for the study of the evolution of the laws under the Ch'ing and is also a convenient comparative study of the Ming and the Ch'ing codes.[32] His other work is a comparative analysis of the Ming and the T'ang codes, revealing the points at which the Ming follows or varies from the T'ang upon which its principal provisions (*Lü*) were largely based. In his preface he states that a study of this type had been made by a Ming scholar, but, as it had been lost, he sought to replace it.[33]

[29] Ch'eng Shu-teh, *Chiu Ch'ao Liu K'ao* (1st ed. Shanghai, 1927).

[30] *Shen Chi I I Shu*, 24 vols.

[31] Ch'eng Shu-teh, *Chung Kuo Fa Chih Shih*, 1928.

[32] *Tu Li Ts'un I* (Peking, 1905).

[33] *T'ang Ming Lü Ho Pien* (Peking, 1922). Draft manuscripts of two other works of his have been recently discovered—the *Fu Chih Pei K'ao* (an investigation of Mourning Regulations) and the *Han Lü Chi Ts'un* (a collection of the extant laws of the Han dynasty). Another work attributed to him has been for the time being at least lost to view, namely the *Han Lü Chüeh Shih Pi* (a study on settling cases according to the Han Law).

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Another scholar whose work merits classification in this group, though he came much more under Western influence than any of those already mentioned with the exception of Ch'eng Shu-teh, is Liang Ch'i-ch'ao. His principal contribution in this field is his history of Chinese political thought prior to the Ch'in period (c. 255 B. C.).[34]

Two careful studies by the Chinese Jesuit Père Hoang on the Chinese law concerning marriage and property are notable contributions to these two subjects.[35]

Professor Ch'eng Shu-teh and Tung K'ang, who held for many years high judicial posts, are the two foremost authorities on Chinese law living today. The works of Professor Ch'eng have already been cited above. Only a small fraction of Tung K'ang's researches has been published. It has been the writer's good fortune to secure printed copies of his lectures given at the Soochow University Law School of Shanghai. Needless to state, the full publication of his studies based upon decades of research is eagerly awaited. No one in modern times has acquired a riper or broader knowledge of the old law. In his lectures on "An Investigation of the System of Punishments in the Spring and Autumn Period (722-481 B. C.)" he not only cites passages from the works of the period relating to law, but conveniently classifies these under appropriate headings and traces wherever possible the evolution of each provision down to the T'ang code. These lectures constitute but a section of the author's general history of Chinese criminal law upon which he has long been at work. A portion of his lectures on comparative criminal law has likewise been printed. Herein he compares the criminal laws of the T'ang, Sung, Yüan, Ming and Ch'ing periods (618-1911) of China with those of England, Rome, Germany, Japan, Italy and Poland.[36]

[34] Liang Ch'i-ch'ao, *Hsien Ch'in Cheng Ch'ih Szu Hsiang Shih* (Shanghai, 1923). The section of the work relating to law and legal theory was translated into French by Escarra and Germain as cited above. L. T. Chen has a full but rather free English translation of the book under the title *History of Chinese Political Thought during the Early Tsin Period* (London, 1930). The title is incorrectly translated or printed, as it should be the "pre-Tsin" (Ch'in) period.

[35] Hoang, Pierre, *Le mariage chinois au point de vue légal* (Chang-hai, 1898), and *Notions techniques sur la propriété en Chine, avec un choix d'actes et de documents officiels* (Chang-hai, 1897, 2nd ed., 1920).

[36] Tung K'ang, *Ch'un Ch'u Hsing Chih K'ao, Hsing Fa Chiao Hsüeh*, and *Jih-Pên Chiang-Yen Lu* (Shanghai, 1934).

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One can merely mention a few of the better studies published by scholars of the younger generation who have had Western training either in historical research or in law. All contain material of value and suggestive comment, but there is need of constant caution in their use, particularly the general works covering an extensive field. The more special studies appearing in such periodicals as the *China Law Review*, the *Fa Hsüeh Chi K'an* and the *Fa Lü P'ing Lun* as a rule possess more lasting merit than the general studies. The list which follows comprises works by Chinese in Western languages:

Wu, John C. H., *Juridical Essays and Studies* (Shanghai, 1928). Contains suggestive comments and some translated materials. The translations are rather too free.

Tseng Yu-hao, *Modern Chinese Legal and Political Philosophy* (Shanghai, 1930). The first chapter contains much of pertinent interest.

Hu Shih, *The Development of the Logical Method in Ancient China* (Shanghai, 1922). The final chapter on "The Logic of the Law" is an invaluable discussion.

Tang Woo, *Les trois théories politiques du Tch'ouen-ts'ieou* (Paris, 1932).

Yié Cheou Tang, *Esquisse d'une histoire du droit chinoise* (Paris, 1924).

Wu, Kuo-cheng, *Ancient Chinese Political Theories* (Shanghai, 1928).

Hui, Tchoan-pao, *Le droit des gens et la Chine antique* (Paris, 1926).

Hung, Hu Yang, *Étude philosophique et juridique et la conception de "Ming" et de "Fen" dans le droit chinois* (Paris, 1932).

Liao Tong, *La succession et l'adoption en droit chinois* (Shanghai, 1923).

Chen, Kia-i, *Les doctrines juridiques et economiques de Koan Tse* (Shanghai, 1924).

A number of works have appeared in the Chinese language in recent years which are largely in the nature of compilations or general discussions of an introductory character. Such, for example, are the following:

Wang, Hung-lieh, *Chung Kuo Fa Lü Fa Ta Shih* (*History of the Development of Chinese Law*) (2 vols., Shanghai, 1930).

Hsü, Ch'uan-pao, *Hsien Ch'in Kuo Chi Fa Chih I Chi* (*Traces of International Law in Pre-Ch'in* [ancient] *China*) (Shanghai, 1931).

Hsü, Teh-yuan, *Chung Kuo Li Tai Fa Chin K'ao* (*Research on the Legal System of China*) (8 vols., 1912-).

Japanese scholars have been and are doing at present some of the very best work in the field of Chinese law. Their work is of a quality equaled only by a handful of scholars in China and the West such as Ch'eng Shu-teh, Tung K'ang, Professor J. J. L. Duyvendak and Professor Jean Escarra. Interest on the part of Japanese in

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Chinese law extends back many centuries, the codes of China, particularly of the T'ang dynasty, having had a profound and fundamental influence on their own codes.[37] Many editions of these codes, particularly for the Ming and Ch'ing periods, were published in Japan with commentaries by Japanese scholars. It has come about, therefore, as a result of this century-old interest, that in the collections in Japan there may be found many rare editions of the old codes as well as of other works of a legal and administrative character, a number of which have apparently long since been lost in China.[38]

Modern Japanese scholars studying Chinese law are then continuing an old tradition. Such renowned Sinologues as Professor Nakata, Kato, Oda, Asai, Hattori, Naito, Kuwabara and Mr. Niida combine, with a profound knowledge of Chinese philosophy and history, training in modern methods of historical and textual criticism and, in some cases, a technical knowledge of Western law. Their studies on Chinese law, as on other phases of Chinese history and culture, possess a solidity and permanence of value quite unexcelled and rarely equaled in other countries. As a highly select list of their publications contains upwards of fifty items, it will be possible here to enumerate only a few of the most significant contributions to indicate at once the scope of the interest, which ranges over the whole field in the point of time, from the earliest beginnings to the present and the highly specialized and technical treatment accorded specific phases or periods in the history of the law and its administration.[39]

[37] Sansom, G. B., "Early Japanese Law and Administration" (Parts I and II), *Trans. Asiatic Soc. Japan*, 1932 and 1934, vols. 9 and 11, pp. 67-109, 11-149. This is a summary translation of the *Yoro-Ryo* or an administration code enacted in 701, and later revised in 718, as it is handed down in the work entitled *Ryo no gige* or a commentary on the code undertaken by Imperial command by Kiyowara Nakuno in 833. It is especially useful to reveal Chinese influence on Japanese law. There will be one more part to complete the study. Also see Professor K. Asakawa's *The Early Institutional Life of Japan* (Tokyo, 1903).

[38] Professor Pelliot in his bibliography, cited above, indicates a number of such works. In recent years, however, a number of editions of works lost to sight have reappeared in China with the sale of private collections to modern public libraries.

[39] Most of the articles mentioned are to be found listed in a select bibliography of articles on the history of Eastern Asia, *Toyo Shi Ronbun Yomoku* published in Tokyo in 1932. I am indebted to Mr. N. Niida of the Tokyo Branch of the Oriental Culture Research Institute for comment as to the nature and value of the work of the scholars listed below.

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Two of the best general works are by T. Asai. One is on the history of Chinese institutions and the other on historical changes in Chinese legal institutions.[40] Mr. Niida has performed a valuable service to scholars in his recovery of the administrative ordinances and regulations of the T'ang dynasty, which he has assembled and properly classified out of more than a hundred extant works of that period and subsequent reigns.[41]

Professor U. Hattori discusses Chinese law frequently in his collected Chinese researches.[42] N. Niida and T. Makino have published an article with respect to the date of compilation of the former T'ang code in which they reach the conclusion that the code, which we have, was compiled in 737 A. D. instead of 653 A. D., the traditionally accepted date.[43]

The select list of articles which follows comprises recent contributions:

Niida, N., "Kan-Gi Rokucho ni Okeiru Saiken no Tampo" (Security for loans during the Han, Wei and the Six dynasties), *Toyo Gakuho*, October 1933, pp. 91-103.

Niida, N., "Shin-Min Shuko Kom Mon no Kenkyu" (Studies of community life and marriage customs in the Ming and Ch'ing periods), *Reports of the Tokyo Branch of the Institute of Oriental Culture*, Monograph number 4 (1933).

Niida, N., "To-So Ji-dai ni Okeiru Kazoku Kyosan to Yui-gon Ho" (Joint-family ownership and wills in the T'ang and Sung dynasties), *Ichimura Hakushi Koki Shikuga Ronbun Shu* (Collection of testimonial essays in honor of Dr. Ichimura's 70th birthday) (Tokyo, 1933).

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[40] *Shina Hosei Shi* (Tokyo, 1904); *Shina ni Okeiru Hoten Hensan no Yenkaku* (Kyoto, 1911).

[41] *Torei Shu-i* (Tokyo, 1933).

[42] *Shina Kenkyu* (Tokyo, 1916).

[43] "Ko To Ritsu So Gi Seisaku Nendai Ko", *Toho Gakuho* (*Journal of Oriental Studies—Tokyo Branch*), Nos. 1 and 2, Mar. and Dec. 1934.

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One conclusion clearly emerges from this survey of research on Chinese law by Chinese, Japanese and Western scholars; namely, that the surface of the field has been scarcely more than scratched. Its boundaries have not yet been fully surveyed. For example, procedural law has been given but slight attention; the influence of Buddhism upon the law and its punishments has been almost wholly neglected, as Professor Escarra points out in his *Le Droit chinois* (pp. 26-30); extant case materials, printed collections of which extend back as far as the period of the Five Dynasties (907-960), though not in any considerable amount except for the Ch'ing period, lie unexamined and provide a rich mine for the social historian as well as the legal historian to work in studying how the law was applied and how conflicts between codified law, on the one hand, and customary law or practice and Confucian ethics, on the other hand, were reconciled; the principal provisions of the codes have not been systematically traced back to their historical origins in the philosophical and religious concepts and the socio-economic backgrounds out of which they emerged. Until this has been accomplished it will be impossible to attempt to achieve for Chinese law what Sir Henry Maine has suggestively accomplished with respect to Indian law, that is—to link up and compare that law with Western law.

In view of this general situation it may be well to survey briefly the extent and nature of the materials available for undertaking

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further intensive research in the field.[44] There is at present no comprehensive published bibliography relating to the subject. The best substitute that exists in a Western language is the monograph by Professor Pelliot, mentioned above, which is by no means complete. Professor Escarra's annotated bibliography in his *Le Droit chinois* is also useful. In the voluminous bibliographical literature of China there are frequently to be found sections on law and jurisprudence, but they relate usually to limited periods. Recently there appeared the first attempt at a comprehensive bibliography, which, in addition to listing works, adds in most cases brief notes concerning the history and nature of the works cited.[45] It includes 574 items, some of which have long since been lost. The writer of this survey is also compiling a bibliography, comprising in its present form over 2,000 items, of which more than 900 are known to exist.

Nearly every branch of Chinese literature contains material of value to the legal historian. Novels, for example, frequently give descriptions of local court procedure and reflect the attitude of the common people toward the law, courts and judges. The main source is of course the codes themselves, editions of which have already been cited. Then there are the dynastic histories, a majority of which contain a special monograph on jurisprudence (*Hsing Fa Chih*) tracing briefly the history of the law under a particular dynasty. The biographical sections of the histories contain accounts of actual cases involving officials and decisions rendered, while other sections summarize important legislation, modifying and interpreting provisions of the code, and describe the organization and function of the higher courts and the Board of Punishments. There are innumerable collections of memorials, decrees and ordinances containing material noting the time and the reasons for changes made in former laws, or for the promulgations of new ones. In addition, there are the commentaries on the law written by noted jurists down through the centuries and the guides to the law, and instructions in its administration, prepared for the local officials to assist them in carrying out their judicial

[44] What follows is intended only to be suggestive, as the main purpose in this article has been to present recent studies based on this material.

[45] Sun, Tsu-chi, *Chung Kuo Li Tai Fa Chia Chu Shu K'ao* (An examination of the works of the jurists through the successive dynasties) (Shanghai, 1934). The author has failed to indicate when various editions of a work appeared, if at any time it was ever published, and in case of rare works to indicate where they are now to be found. This considerably lessens the practical use to which the work can be put.

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functions. The large collections of published case materials, which run back for centuries, comprise an important source and indicate the large rôle which precedent played in the decisions of the judges. For the Ch'ing period the amount of this case material which is published, or which lies in manuscript form in national and local archives, is considerable. For example, one archive alone in Peking contains the records of upwards of 100,000 cases involving capital punishment or exile. This particular archive, located in the Pei Hai, is under the control of the Historical and Philological Section of the Academia Sinica. The study of the philosophy of Chinese law necessitates an examination of not only the works listed as belonging to the juridical school (*Fa Chia*) by the Chinese bibliographers, but also the works of the other schools of thought, including Confucianism, in order to present a full picture of the prevailing concepts entertained by the official-literati class of China down through the centuries.

To limit research to these materials, which are relatively easy of access, would be to leave untouched, for the most part, aspects of Chinese life under control of customary law or practice which were not caught in the net of the Emperor's law. The customary practices of the people and the merchants have been and still are frequently of a highly local character, as a result of which generalization in this field is difficult, if not impossible. Furthermore, documentary materials illustrative of these practices are fragmentary and scattered. In the course of the past two decades there has been appearing in print an increasing number of studies of a sociological character, made by both private and governmental organizations, based upon detailed surveys of specific local areas. These studies are gradually opening a hitherto largely unknown realm to the Chinese, as well as to the Westerners, revealing the actual conditions and customs among the people. The absence of this type of material in the past explains in part the failure of the modern codes to fit the actual prevailing needs and customs of Chinese society. Conscious of this lack, the Codification Commission some years ago attempted to gather some material together to form the basis for further codification.[46] Codifiers of the future, as well as students of Chinese law and society, will have an increasing amount of reliable information upon which to base their studies and conclusions, as these surveys are extended by a growing body of modern-trained Chinese economists and sociologists.

[46] *Min Shang Shih Hsi Kuan T'iao Ch'a Pao Kao Lu* (Collected reports of an investigation into the customary practices of the merchants and the people) (2 vols., Nanking, 1930).

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The cultivation of these rich sources will amply repay the Chinese, enabling them the better to appraise and understand the still virile and ancient traditions of their people and permitting them to draw up more adequate modern codes, better suited than the ones they now have, to meet the needs of their very slowly modernizing society. For the Westerner the study of Chinese law will provide a deeper and more realistic understanding of the evolution of the unique customs and institutions of Chinese society. In additon, the comparative point of view with which the Western scholar, either unconsciously or consciously, approaches the field will enable him to contribute fresh materials to the field of comparative law. The prevailing conceptions of the law and its function in society entertained by the Chinese through the centuries stand frequently in striking contrast to those in the West.

In the realm of international law, for example, the Chinese have adhered in theory, and in part in practice, to concepts dissimilar from those currently predominant in the West. As Senator Elbert D. Thomas, author of *Chinese Political Thought* (New York, 1927), forcibly stated in an address before the annual meeting of the American Bar Association in 1935, Chinese law unlike Western law "was not obsessed with any concept of revelation." Hence their concept of sovereignty was relative, not absolute. "The sanction for every concept rested on reason and grew out of social and political experience and had its authoritative basis in morals." While adhering to the doctrine of *pacta sunt servanda,* "they condemned a forced contract between states and taught that a forced covenant could be disregarded." Harmony, not abstract justice, was the ideal which they sought to establish in all relations. This harmony was to rest upon mutual self-respect, adherence to a policy of live and let live in conformity with the natural moral order. Due consideration was given to altered and changing circumstances beyond individual or group control and responsibility, which left the way ever open to the arts of diplomacy, arbitration and compromise for the alteration or annulment of agreements previously entered upon. The Chinese saw no inconsistency in the simultaneous recognition of the doctrines of *rebus sic stantibus* and *pacta sunt servanda* as both were interpreted in a relativistic sense and were subordinated to a higher principle which stressed the desirability, if not the necessity, of maintaining harmonious relations. Rights and obligations stipulated in a signed treaty or contract were subject to alteration in the light of larger

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duties arising from the necessity for preserving the natural or moral order.

Likewise the characteristics of Chinese customary law with its emphasis on human rights over property rights, on duty over right, on individual and group responsibility for the social consequences of all acts stand in marked contrast to the significant characteristics of Western law. The skill of the Chinese in the arts of compromise and conciliation born of a deep-seated distaste for litigation, and of distrust of the courts, has placed striking and definite limitations upon the sphere in which law operates in their society in contrast with the ever widening sphere through which law operates in Western societies. In these contrasts lie stimulating and fruitful problems for study and contemplation by historian, philosopher and social reformer.

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THE ECONOMICS OF THORSTEIN VEBLEN

PROFESSOR WESLEY C. MITCHELL performs with remarkable success the difficult task of interpreting the thought and writings of Thorstein Veblen, one of the few original thinkers of his age in the field of sociology and economics.[1] Every writer in this field is bound to put a good deal of his individual experience and outlook into his processes of thinking and his valuation of the human scene. Mr. Mitchell, therefore, wisely begins by emphasis upon the detached position held by a young Norwegian born and bred in a distinctively Norse settlement within the surrounding American environment. Amid the multitude of American personal and social contacts of his varied life Veblen retained and exploited this position of the onlooker who sees most of the game. It helped him to maintain that objective rôle of criticism which kept his mind aloof from the dominion of those traditional thoughts and valuations which are impediments to intellectual independence. He brought certain Viking qualities of fearless adventure and of playfulness into his treatment of the world in which he found himself.

These qualities made him difficult to understand, for they not only forced him into violent repudiation of many accepted views and sentiments, but also led him to develop a humorous terminology that helped hostile criticism to disparage the substance of his argument. Indeed, the very term "idle curiosity", to which quality he attributed all the later achievements of disinterested science and philosophy, was an example of his humorous litotes. The story of how this curiosity came to extricate itself, first from the semi-magic of primitive mentality, and afterwards from the subjection to the utility of craftsmanship is one of the guiding threads in Veblen's deeper thinking. The union of science with humor is best realized in modern psychology with its sudden reversals of surface thinking and its dramatic revelation of subconscious processes. Veblen, as soon as he had passed through an early phase of philosophic study, betook himself to anthropology as the seed-bed of social psychology. It was within this historical evolutionary field of social institutions that he found his

[1] *What Veblen Taught*, edited by Wesley C. Mitchell. New York, The Viking Press, 1936. l, 503 pp. $3.00.

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economics. Needless to say, it was not the accepted economics of the academic world. Though most of the formative economists, from Adam Smith onwards, have expressed personal sentiments of humanism in their general reflections upon economic life, their science has throughout been dominated by a utilitarian hedonism which sought accurate expression in pecuniary valuations of cost and utility. While some growing recognition of economic life as an evolutionary process, involving changes in the arts of production and consumption, entered into the modern science, it never displaced the hedonist calculus which has seemed essential to a science of increasing exactitude.

Veblen's humanism never leads him into the Ruskinian identification of wealth with life. He clearly recognized that economics should limit itself to man's dealings with the material needs of life. But this requires an examination of the psychical history of material civilization with all the varied instincts, urges and activities involved. To present economic man as a rational being, calculating and regulating all his activities in terms of conscious costs and satisfactions, falsifies the actual situation, for it requires the suppression of facts and activities which intimately interfere with the hedonist calculus. The recent failure of economic forecasts is manifestly due to this policy of intellectual separation.

Veblen's great contribution to economic science lay in his insistence upon the wider basis demanded by his biological and anthropological studies. "Instead of studying pleasures and pains, or satisfactions and sacrifices, on the supposition that these 'real forces' determine what men do, economists should study the processes of human behavior at first hand. For this purpose, the important psychological categories are not the felicific calculus and the association of ideas, but propensities and habits" (p. xxvi). For example, the output of energy in the performance of skilled work, "an instinct of craftsmanship", submerged by machine-tending but partially recovered by machine control and direction, the preference for easy routine work with sufficient leisure, for black-coated respectability in a bank or office at low remuneration, the display of personal power and prestige in productive operations as well as in conspicuous consumption—these and many other features of our social-economic life illustrate the close interaction between the narrow hedonism and the more varied, elusive and immeasurable propensities. So likewise with habits, intellectual, emotional, active. They shift and change in unpredictable ways, and each shift and change affects the whole economic structure of industry and markets.

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This recognition of the large part played by non-rational forces did not make Veblen an irrationalist. Quite the contrary. With a clear determinist view of causation he applied his reason to the economic interpretation of history on lines somewhat different from those of Marx. Living a generation after Marx and in a country where the sharp distinction of workers and owners, capital and labor, was less applicable than in early nineteenth-century England, he saw a different array of economic forces and a different procedure of class conflict. His great discovery was the new phase of capitalism by which the supreme powers and profit were passing from the owners of the material forms of capital into the owners, or, more properly the operators, of finance. This seemed a natural and inevitable result of an economic art in which the market was the central feature, and which was supported by an economic science where money alone was "the measuring rod" of value. Capital, in other words, had come to mean not the land, the plant, physical power and raw materials which were operated by human skill and labor for producing material wealth, but the stocks and shares which expressed their value in the money market. But the control of these pecuniary values had taken a new turn in the eighties and nineties when Veblen began "to take notice". The money market was no longer the passive instrument for recording changes in industrial and commercial values, but an active instrument for determining these values.

The rapid technological advance of the last two decades of the century, transforming and enlarging the productive powers of capitalism, had two results. First, it intensified the competition of independent business in the great standard industries and brought destruction to the weaker competitors, leaving to the stronger a bigger inducement and a better facility for combination. In each basic industry some powerful producer, with a superior pull upon supplies of raw material or transport, set himself to organize the industry into a trust, a cartel or other form of combine, with the view to controlling and allotting markets and to regulating output and selling prices on a basis of maximum profits. This process in iron and steel, oil, railroads, etc., was a distinctively financial process, the work of bankers and Wall Street speculators in public credit and private investment. It consisted in the taking over of the values of vast business concerns, inflated by the speculative gains from the future profits of controlled industries and prices, and involved large immediate creations of credit instruments only fashioned by financiers. "The holding-company and the merger, together with the interlocking directorate, and

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presently the voting trust, were the ways and means by which the banking community took over the strategic regulation of the key industries, and by way of that avenue also the control of the industrial system at large" (*Absentee Ownership,* p. 338). This financial control was visualized by Veblen as involving a policy of industrial "sabotage", a deliberate restriction of the productivity of capital and labor in order to keep prices and profits higher.

Upon the antagonism between "the engineer" and the capitalist-financiers thus engendered, Veblen finds a "class-war" differing in character from that of the ordinary Socialism. Since profiteering has virtually passed from the capitalist-employer and the shareholder into the hands of the financial controller, the former will find their interests more in common with those of their employees. In fact the real opposition is between the producers of wealth and the manipulators of prices. Money, instead of being the servant of industry, has become its master. An increasing proportion of the people are engaged in selling processes, while increased unemployment takes place among manual and mental producers. The recent depression, with its visible excesses of productive power, appears to support the thesis which becomes more and more prominent in Veblen's later writings. It was manifest that, if the dominion of this money power was to be overthrown, this could only be brought about by united action of the workers and the "engineers" whose joint interest lay in the full employment of the best technological equipment. This line of thought led Veblen to minimize the direct conflict between wage-earners and their employers as seen in the opposition of the latter to trade unions and collective bargaining. For if the employer is not in a position to keep to himself the profits of cheap labor, the conflict of capital with labor loses its significance. In a word, Veblen stands with Socialism in denouncing profit as the motive of business enterprise, but removes it from the place it occupies in socialistic theory and puts it in a distinctively financial quarter. Here he is in accord with large sections of the American public, whose denunciations of "the money power" form the staple of their economics, though they would be unable to follow the intricacies of Veblen's reasoning. Had he lived longer Veblen might have been disconcerted by the dramatic collapse of the banking system after 1929, though he would probably have found in the present recovery the signs of a more powerful rebuilding of the money power.

Interesting as it is, this opposition of "the Engineer and the Price System" will not form Veblen's chief claim to lasting recognition as

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a social-economic thinker. For it cannot be admitted that the profits of industry are normally and generally enlarged by this process of "sabotage", involving as it does the continued unemployment of large quantities of plant and labor, and a reduced volume of consuming power among workers and employers. Though there are industrial situations where it may pay to restrict production and earn high profits on a limited sale, this is not a normal case. Low production means not only waste of plant but other high "overhead", while this very process of restriction reduces the purchasing power which would have made it more profitable to sell a larger output. Veblen nowhere directly tackled the real problem of maldistribution of income which periodically upsets the changing balance between spending and saving, between new investment and increased consumption, that lies at the root of the failure of current capitalism to function as well as it used to do.

His high claim to intellectual distinction, his main service to social science, lay in his insistence upon interpreting social institutions and their values in terms of an instinct-habit psychology which gave a main determinant place to economic activities and needs. It is here that his brilliant and patient researches into biology and anthropology bear fruit. His *Theory of the Leisure Class,* though the best known of his writings, has probably lost some of the intellectual weight to which it is entitled because of the pervasive humor of its exposition. But its skilful account of the subtle ways in which the superior prestige of the predatory acquisition of property has through the ages molded habits of valuation in home and wider social circles, in methods of personal display through conspicuous luxury and leisure, sport and culture, entitles it to rank as a leading "book of revelations" in our time. The wide range of his exposition is well illustrated, on the one hand, by the attention he pays to woman's dress and other details of the prestigious life on its material sides, and on the other by his subtle analysis of educational standards and controls which seek to dominate the mental life. A rich personal experience of academic institutions informs and to some extent biases his account of the ways in which American seats of learning are subject to the molding influences of wealth, in the appointment of presidents and professors, in the direction of the teaching, and in the relative prestige of the subjects taught. But, while dwelling upon these interferences with disinterested education, Veblen never loses sight of the "idle curiosity", or scientific urge to knowledge "for its own sake", which helps the higher teaching to evade all formal efforts to throttle its

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freedom. The very consciousness of the defensive tactics of "im property" in the educational field arouses an equally conscious resent ment in the free-minded teacher, who is thereby stimulated to fin means of expression which have educated a generation of young "in tellectuals" to play a dominant part in the progressive movement of their time. Predatory finance is not able in the long run t contaminate the founts of knowledge so as to rally to its support th alert and informed intelligence of the community.

With all his elaborate rationalism Veblen was in one sense disorderly thinker and writer, which means that he left his mind fre to develop all sorts of aberrations and surface inconsistencies. Mr Mitchell, therefore, performs a most useful service in the selectio and ordering of the salient passages which present his thinking, roote in scientific and philosophical reflections, and proceeding along broad highway of evolutionary economic determinism into the man interesting bypaths of political, social and educational commentar that occupied his last years.

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REVIEWS

The History of Western Civilization. By HARRY ELMER BARNES. New York, Harcourt, Brace and Co., 1935. 2 vols.—xxiv, 911; xxiv, 1170 pp. $10.00.

There have recently appeared on the market a considerable number of general surveys of history, and several others are now in course of preparation. Some are definitely tailored to fit college and university courses, others are designed more for the general reader, or aspire to meet the needs of both the student at his desk and the layman in his arm chair. Dr. Barnes's book is, on the whole, of the last mentioned type, though its unusual length, richness and complexity of content, together with its frequently controversial tone, might cause younger students to approach it with hesitation; certainly a college senior or an inquiring alumnus would gain more profit from its pages. There is still, as the author notes in his preface, a type of scholar who holds that the compression of general history into a single volume, no matter how vast, is an illegitimate and impossible undertaking; that the scholar can do no more than cultivate his own little garden patch of Merovingian France or Jacksonian America without straying into other people's property. Dr. Barnes vigorously, and, in this reviewer's opinion, cogently, defends the synthetic history, the right to paint a panorama as well as a miniature. Well aware that no man can be a specialist in every field, he has had his manuscript read and criticized chapter by chapter by men who are unquestioned masters of each topic or period concerned. There are many defects in the work, considered in its plan as well as in detail, but it is questionable whether any of them come from undertaking to survey too many lands and too many centuries. The standard of accuracy is high and the sources used are generally those which any scholar would approve in his own field.

Before descending to criticisms of detail one should stand a little apart and try to picture the grand historical pageant as a whole. The author begins with a discussion of ape-man and his evolution to full humanity; considers various anthropological theories as to primitive institutions and ways of thought; traces the civilizations of the

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Near East and of the classical world; considers the medieval culture with special emphasis on the cult of the supernatural; discusses the Protestant Reformation and especially its relationship to nationalism and capitalism; proceeds with a rapid and rather condensed survey of political history, followed by discussions in topical form and at great length of the development of modern science and industrialism; returns again to review and assess modern democracy and political methods; discusses the origins and consequences of the World War; then introduces a survey of recent scientific development and its effect on literature, art, religion and industrial life; draws a sympathetic picture of the Soviet Russian experiment; concludes with final observations on the intellectual outlook of modern science.

For such a survey Dr. Barnes has many qualifications. He is always interested himself, which is the first requisite in interesting students or readers. Rarely does he write a dull page. His information is amazingly broad in scope; he is as much at home with the chemists as with the diplomats, and he is familiar with the latest theories in economics, anthropology, psychology, sociology and nearly the whole range of social studies. He is obviously a warm-hearted humanitarian and his genial personality will inspire sympathy in all but the coldest readers. Though he has and expresses opinions on controverted subjects, he is fair to the extent of giving long citations and numerous references to illustrate divergent points of view. Moreover, he has done a good piece of book-making; his work is attractively, though not profusely, illustrated and has an exceptionally full series of chapter bibliographies.

The chief fault that can be found in this splendid attempt at historic synthesis is in form and arrangement. The treatment of material mainly by topic rather than chronologically is carried so far as to confuse even the trained reader, and it must at times leave the young student utterly mazed. Thus a group of revolutions—English, American, French and Central European—are taken together in chapter iv of the second volume, including events as late as 1905. The "rise of democracy" comes in chapter xiv, between three and four hundred pages later, discussing all sorts of political issues of the eighteenth, nineteenth and twentieth centuries, with "flash back" references to the Middle Ages and ancient Greece. This method results not only in chronological confusion but in extensive repetition. In volume one, for example, the "Teutonic myth" is refuted at length on pages 397 to 401 and again from pages 445 to 447, although it had already been critically discussed on pages 163 to

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165 in connection with an account of the Aryan languages. This is, unfortunately, typical of a score of other discussions. The amount of space taken up in the second volume in attacking American political parties and methods, and the way in which the material is scattered in widely separated chapters, could only be justified in a textbook on political science which made no attempt to follow a chronological narrative. The whole work could have been shortened by at least a third by omitting some of the long and repetitious passages dealing with controversies among various schools of historians and social scientists.

The overwhelming emphasis on the problems of the present generation may also provoke some criticsm. We are fortunately far from the days when a respectable historian was supposed to stop a century or a generation before his own time, but it is perhaps going to the opposite extreme to devote approximately as much time to the still adolescent twentieth century as to the entire period from the Cave Man to the Fall of Rome, or from the Fall of Rome to the end of the Protestant Reformation. Of a dozen or more general world histories, or histories of civilization, which come to mind, no other has devoted relatively so much space to the immediate present and none, unless it be that of Mr. H. G. Wells, has devoted so much to speculation about the possible future. Very minor novelists now living are accorded much fuller treatment than Shakespere and his contemporaries, and a like disproportion applies to nearly all other fields of human activity besides literature.

A final fault is excessive dogmatism. Dr. Barnes has the defects of his qualities, and the most attractive of his many fine qualities is his enthusiasm for the persons and causes that he happens to admire and the corresponding zest with which he attacks whatever he dislikes. This sometimes results in a rather chip-on-the-shoulder attitude and an almost swashbuckling manner. St. Thomas Aquinas' philosophy "is a colossal monument to intellectual futility" (I, 749); "the rigorous code of private ethics developed by the Puritans was in part an overcompensation for their primary absorption in the week-day processes of material gain in such dubious pursuits as piracy, freebooting, the slave trade and the rum trade" (I, 862); "England made the decision to enter the war after Germany had proposed to keep out of Belgium and refrain from attacking France if England would remain neutral" (II, 591); "Not only have the problems that must be settled by governmental control or supervision become much more numerous and complex in the last century, but the quality of

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our public officials has declined to an alarming degree" (II, 862); the Briand-Kellogg Peace Pact is "the most somber and colossal monument to the folly of the formula enthusiasts" (II, 922). Without entering into a discussion of the merits of these dicta, it may at least be said that few historians would have ventured to make them without very serious qualifications. Dr. Barnes is at times much more the propagandist than the historian.

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A History of the Far East. By G. NYE STEIGER. Boston, Ginn and Company, 1936.—vii, 928 pp. $4.75.

Japan's Foreign Relations, 1542-1936. By ROY HIDEMICHI AKAGI. Tokyo, The Hokuseido Press, 1936.—xv, 560 pp. $4.00.

Must We Fight in Asia? By NATHANIEL PEFFER. New York and London, Harper & Brothers, 1935.—v, 244 pp. $2.50.

Toward Understanding Japan. By SIDNEY L. GULICK. New York, The Macmillan Company, 1935.—ix, 270 pp. $2.00.

To understand thoroughly the present-day Orient, with its rising tide of nationalism, one must not be content with a knowledge of Oriental history during the last few centuries—the period of Western contact with the East. As Professor Steiger says in his *History of the Far East* (pp. 4-5), "modern India is conditioned by Gautama, Asoka, and Mohammed Ghori as strongly as by Albuquerque, Clive, Warren Hastings"; to understand Chinese nationalism "it is as important to know something of Confucius and Wang-An-shih as it is to have studied about the Opium War and extra-territoriality"; and "the reforms of the Meiji era in Japanese history will be better understood if the student knows something about the earlier Taikwa reforms and about the origin of the Shogunate." It is in this spirit that he has tried to cover a vast subject, the history of more than five thousand years of the cultural area generally known as the Far East, which is inhabited by more than half of the world's population.

The work is divided into 33 chapters dealing with the history of India, China, Japan, Korea, Indo-China and Malaysia. The author's plan is to present the history of these countries serially in successive chronological periods. For instance, the second chapter deals with "China: from Earliest Times to the End of the Ch'in Dynasty", and the third chapter with "India: from Earliest Times to the End

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of the Maurya Dynasty". About three hundred pages are used to cover the history of the Far East since the early part of the nineteenth century. The author devotes some forty pages to an extended and select bibliography on the Far East, and there is an excellent index. It is evident that Professor Steiger has tried to be objective, but in some places he has made broad generalizations which are not entirely accurate. Thus he writes: "During the first twenty years of its existence, 1885-1904, the Indian National Congress, although handicapped by the fact that it contained no delegates from the Moslem part of its population, steadily increased its prestige" (p. 647). The truth is that from the very beginning politically minded Moslem leaders took active part in the National Congress, and more than once during the years 1885-1904, as well as afterwards, a Moslem was chosen president of the Congress. The author expresses his sympathy with the peoples of the Orient in their aspirations, yet at times he fails to grasp the spirit behind their attitude of resentment toward Western imperialism. On the whole, however, the book will be of value to those who wish to acquire the rudiments of the history of the Far East.

In *Japan's Foreign Relations, 1542-1936,* Professor Akagi devotes only fifty-three pages to Japan's foreign relations before the restoration of 1867-68. The rest of the book is concerned with the foreign relations of modern Japan. The main thesis of the work is to be found in the following sentence: "Since the early years of the Meiji Restoration, the attainment of equality and security became the cardinal principles of Japanese diplomacy" (p. 85).

This thesis is applied in detail in discussing all the major issues of Japan's foreign relations. The author holds that Japan's national security demanded that Korea must not fall under the domination of any power inimical to Japan; and Japan fought China and Russia for this purpose. She annexed Korea with the full sanction of all the great powers, the United States included. She supported the Open Door policy to assert equal opportunity for commerce in China and to oppose Russian advance in Manchuria. The Anglo-Japanese alliance was formed, so far as Japan was concerned, to save her from isolation in world politics and as a diplomatic weapon for combating Russia. Japan entered the World War to eliminate Germany from the Far East. She forced China to sign several treaties (generally known as the Twenty-One Demands), compelling her to agree not to sell, lease or cede any part of her territory to any other power; and at the same time she revised leases of railways in Manchuria for

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ninety-nine years in order to strengthen her own position on the Asiatic mainland. At the Versailles Peace Conference, with the consent and support of her allies, Japan acquired all Germany's rights in Shantung. At the Washington Conference she had to give up most of what she had won during the World War, and she was virtually isolated in world politics after the abrogation of the Anglo-Japanese alliance. After the Washington Conference she tried to win over China to her side; this was the policy of Baron Shidehara. But Japan's conciliatory policy was regarded as evidence of weakness by the Chinese leaders, who pursued a policy of ousting Japan from Manchuria through the coöperation of other powers; and this resulted in Japan's adopting a so-called "forward policy", with the ensuing Manchurian crisis and the creation of the state of Manchukuo. Premier Hirota's foreign policy is to settle outstanding problems with all nations peacefully whenever possible, but without surrendering Japan's rights or endangering national security. Japan is anxious to secure Chinese coöperation in order to maintain her dominant position in the Far East; but at the same time she is determined to crush China if the latter plots with other powers against her. Just as the United States wishes to maintain her dominant position in the American continents through the assertion of the Monroe Doctrine, similarly Japan is determined to enforce her "Asiatic Monroe Doctrine" in spite of opposition from other quarters.

On the whole the work is an excellent and lucid exposition of its subject. It is to be expected that many Western and Chinese scholars will not agree with Dr. Akagi's conclusions. The author has not given references to original works or documents to substantiate his assertions, which may be disputed by others. This is a serious defect in his book, and for this reason many will regard it as a biased discussion of the subject from the Japanese point of view alone. It is to be wished that this defect could be remedied in a future edition. Meanwhile, the book will serve as a corrective for those who are over-anxious to assert that the main feature of Japanese foreign policy is an aggressive imperialism, violating all treaty obligations.

There is a widespread belief in this country that Japan's policy toward China will eventually force the United States into a war with Japan. Mr. Peffer in his excellent work *Must We Fight in Asia?* discusses this vital question with care and thoroughness. He recognizes the fact that Japanese policy in China is the reflex of that of Western imperialism, which has victimized China for more than a century (pp. 32-37).

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Japan's justification of her policy of expansion in the Far East at the cost of China is this: If the countries of the Far East are to be conquered, then why should not Japan be benefited by playing the rôle of conqueror and keeping the Western powers away from that region. Furthermore, Japan is justified in assuming that the Western powers have not abandoned their predatory policy in Asia and that therefore, from her standpoint, the only way to check Western aggression in the Far East is to assert her own dominant position there (pp. 93-96). This is the fundamental basis of Japanese expansion in North China, and the Japanese nation is solidly behind the Japanese leaders who are advocating the policy of expelling the Western nations from the Far East and expanding Japanese power in that region. This popular support is based upon patriotism as well as economic necessity, which requires that Japan shall have full control over certain types of raw materials and markets for her industrial expansion. It is the raw materials and the markets of China that are necessary for the very existence of Japan as a great power. By establishing her political preponderance over China, Japan can assure herself of these requirements. The author candidly recognizes that Japanese expansion in China has been made possible by the existing disorganized condition there.

Since Japanese commercial expansion in China has injuriously affected British economic interests, it is Great Britain's policy to oust Japan from the continent of Asia through international support. America's commercial interest in China, especially in Manchuria, is not great, but there is a latent hostility toward Japan in the United States, and through propaganda this could be so roused that the United States might be dragged into a war with Japan (p. 157).

The Japanese advance toward Inner Mongolia and the growing friction and border raids between the Soviet Russian protectorate of Mongolia and the Japanese protectorate of Manchukuo point to the possibility of a Russo-Japanese conflict. Soviet Russia does not wish to force an issue with Japan at the present moment when her position in Europe is not very favorable. If a Russo-Japanese conflict should break out, however, it might lead to a world conflict. In case Japan were defeated in such a war, China would probably become a communist state. This would not be agreeable to many of the imperialistic and capitalistic states of the West, particularly Great Britain, which wishes to weaken Japan.

Although there is no real reason for the United States to fight Japan, yet the American people, against their best judgment, might

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be influenced to side with Japan's enemy on the sentimental ground that by fighting Japan they were fighting for the freedom of China and against Japanese autocracy, which is supposedly a menace to human progress. Mr. Peffer gives the impression that the United States will be forced either to surrender her commercial rights in the Far East or to fight Japan. But there is another possibility. By conceding the political and economic supremacy of Japan in the Far East and coöperating with her in the commercial and industrial development of that region, the United States might become an economic gainer. It is conceivable, however, that the United States would rather fight Japan than coöperate with her. If the United States ever does fight Japan, Mr. Peffer thinks that it will be on the supposed or real ground of competitive aggression, due to the desire of each country for economic expansion in the same region. This view may be correct. But I hold that there is room for economic coöperation between Japan and the United States in their economic expansion in the Far East; and if statesmen in both countries follow this policy, they can avoid war without sacrificing the real interests of these two great peoples.

In *Toward Understanding Japan* Dr. Sidney Gulick, after analyzing the various phases of Japanese national and international policies, advocates the application of "the good neighbor" policy for the solution of all outstanding problems between the United States and Japan. He does not believe that the United States must fight Japan to maintain American commercial and economic interests in the Far East. He suggests the following definite program to promote better understanding between the two countries. The United States should: (1) frankly acknowledge Japan's predominant position in the Far East instead of challenging it; (2) promptly adopt legislation granting to *aliens ineligible for citizenship* the right of immigration under the restrictions of the quota law of 1924; (3) cease opposing Japan's demand for naval parity; (4) recognize Manchukuo; (5) coöperate in stabilizing Pacific relations by means of a security pact. Dr. Gulick believes that by adopting such a policy the United States, instead of losing her trade in the Orient, would augment her influence there in every way. There is no question that by doing so American-Japanese relations would become more cordial and help to preserve peace in the Pacific. Dr. Gulick has an intimate knowledge of Japanese affairs, and his book is deserving of careful study.

TARAKNATH DAS

NEW YORK CITY

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The Nazi Dictatorship. By FREDERICK L. SCHUMAN. 2d ed. New York, Alfred A. Knopf, 1936.—xiii, 516, xiv pp. $3.50.

Hitler. By RUDOLF OLDEN. Translated by Walter Ettinghausen. New York, Covici, Friede, 1936.—394 pp. $3.00.

Professor Schuman begins his book on the Nazi dictatorship with a statement regarding objectivity which is of the utmost candor. "If objectivity", he writes, "means the analysis of social phenomena within a frame of reference broader than the phenomena themselves, then this study is objective. But the new dictators who 'think with their blood' repudiate all objectivity and scientific detachment as evil products of liberalism and of 'Jewish-Marxist materialism.' Under these circumstances any effort at objectivity implies *per se* the adoption of an attitude evoking negative emotional responses from the patients under observation. Like every form of highly emotionalized and subjectivized mass mysticism, National Socialism demands acceptance or rejection. Objectivity is equal to rejection" (p. x).

Despite its passionate bias against everything for which National Socialism stands, Professor Schuman's work represents a lucid and often highly dramatic account of the rise of the National Socialist Party, the organization and structure of the Party, the Nazi *Weltanschauung,* the events leading up to the advent to power and the ravages wrought upon German life and policy by three years of Nazi rule. In the revised edition a section has been added on the events of 1935-1936.

It is perhaps too early to look for a critical evaluation of the sources for the history of National Socialism. Yet the reviewer cannot help but feel that Professor Schuman has based many portions of his account on most questionable sources. Too much reliance is placed on Hitler's *Mein Kampf* and the diaries of Goebbels, as well as other Nazi partisan works. When such works are used to illustrate Nazi psychology and mentality, they are legitimate. In the light, however, of Hitler's dictum that "part of the secret of being believed lies in the size of your lie", such works are hardly reliable as sources for historical narrative. On the other hand, Professor Schuman uses very extensively the materials from the anonymous *Berlin Diaries,* published from the anti-Nazi front. It is now generally accepted that these diaries are spurious.

Professor Schuman also reveals a rather uncritical bias against the Social Democrats. It has become a standard practice of many liberal historians to borrow heavily from Communist attacks on the Social

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Democratic Party of Germany. The German Social Democrats were undoubtedly guilty of many grave political blunders, but it is hardly fair to say that "If compelled to choose between Fascism and Communism, the Socialists would choose Fascism" (p. 228). This is merely the reflection of the now discarded Communist slogan of "social fascism". The same bias is reflected in the author's treatment of the Communist Party of Germany and its tactics for a united front. The most recent policy of the Communist International and the speech of Dimitroff at the last meeting of the World Communist Congress indicate that even the Communists themselves have now confessed that their tactics were wrong. Yet Professor Schuman still defends them. He fails to mention the interesting facts brought out at the Reichstag fire trial concerning Hilferding's overtures to the Communists in February 1933 and the rebuff he received. He ignores completely the fatalistic policy of the Communists in 1932 and 1933, which proclaimed that fascism is inevitable as a stage preceding communism. And even more important, the author fails to emphasize the numerous occasions upon which Communists cooperated with the Nazis in undermining the Weimar state. There was, as a matter of fact, great temperamental and psychological affinity between Communists and Nazis. This is shown in the various shifts of Communist voters to National Socialists and in the great number of cases of individual Communist leaders who became Nazis and vice versa. Lieutenant Scheringer, the idol first of the Nazis and then of the Communists, Fritz Nonnenbruch, now the leading economic writer for the *Völkischer Beobachter* and formerly a Communist writer, Karawahne, a Reichstag deputy and witness at the fire trial—these are but a few illustrations of such shifts.

The lengths to which this prejudice will lead him is shown in the author's treatment of the Von Papen coup against the Socialist ministry in Prussia in July 1932. "All observers," writes Professor Schuman, "including Schleicher, were agreed that if Braun and Severing had arrested the Von Papen cabinet for violating the constitution, mobilized the Prussian police, made common cause with the Communists, called a general strike, and fought the coup to death, their chances of success would have been excellent, even against the Reichswehr. Such tactics had defeated the Kapp putsch in 1920" (p. 172). The Prussian police, however, were already infected with Nazism and the Communists were not ready for common action. Furthermore, it is impossible to compare the situation of 1920 with that of 1932, when the German nation had been ravaged by twelve

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years of economic distress and when the forces of reaction had the aid of the millions of Nazis throughout the land. What chances were there under such conditions for a successful general strike? It might have been a heroic gesture like the action of the Austrian Socialists in February 1934, but the chances of success were highly problematic. Incidentally one would also like to know the historical source for the legend Professor Schuman presents of Karl Severing finding himself in a concentration camp with a placard around his neck reading "On July 20, 1932, I failed to do my duty."

The most disappointing section of this volume is that dealing with the analysis of the underlying reasons for the advent of Hitlerism. One wishes that so competent a political scientist as Professor Schuman had devoted himself to such an analysis rather than to mere narration and description. He definitely rejects the interpretation of National Socialism as an outgrowth of long historical developments in Germany. "The gospel of the NSDAP", he says, "is intelligible not in terms of the history of political ideas, but only as a manifestation of wide-spread emotional maladjustments in post-War German society" (p. 96). "German fascism is comprehensible only in terms of the economic difficulties and the psychic disorders of the post-War *Kleinbürgertum*" (p. 97). Furthermore, he raises a doubt as to the usefulness of studies of ideological origins of political theories for the student of social and political processes. "Historians of ideas, moreover," he states, "are prone to assume that man is rational and that ideas move the world. But the evolution of political and social word symbols at the hands of the intelligentsia is merely a surface phenomenon of the evolution of social and political interrelationships. Political theories are socially significant only in so far as they reflect and influence mass emotions and collective political behavior" (p. 96).

The point at issue is not, however, as to which are of greater importance, mass emotions and collective public behavior or political ideas. The fact is that these mass emotions are in themselves products of an historical environment and of political and social education. National Socialism required a favorable intellectual climate, and it is of primary importance to study this intellectual climate in order to understand how National Socialism came into being. Intellectual, moreover, does not mean merely academic theories; ideas do not necessarily mean *rational* ideas. It is not possible to dismiss this kind of intellectual history by carrying it *ad absurdum,* as Professor Schuman does when he pretends to connect National Socialism not

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only with Italian Fascism, Lagarde, Spann, Spengler, Chamberlain, Nietzsche, Fichte and Hegel, but also with Pareto, James, Le Bon, Burke, Hobbes, Bossuet, Bodin, Macchiaevelli, Luther, Caesar and Tacitus, and then adds "Beyond Tacitus it is perhaps scarcely worth while to go." For an adequate understanding of National Socialism it is necessary to make a thorough study of the peculiar historical development of Germany and of the leading intellectual currents in nineteenth-century Germany. That post-war developments were of enormous significance is hardly a matter of dispute. But to explain why the reactions to these developments assumed the form they did and no other, or why such developments did not have the same result in other countries, requires a long-range view of the historical development of Germany. Perhaps if Professor Schuman had directed his attention to these historical backgrounds, he would not have made the misleading deductions found in his work whenever he does venture into the field of German intellectual history.

The section on anti-Semitism reveals this weakness. It is hardly just to say that "anti-Semitism was genetically the foundation of the whole ideological superstructure of National Socialism" (p. 109). The end to which his non-historical attitude leads him is revealed in his statement that the "Jew merely happened to be the most convenient whipping boy. In a slightly different context equally satisfying results could have been achieved by persecuting all people with red hair or with pug noses or with long (or round) skulls" (pp. 112-13). Nazi anti-Semitism rests on a much more complex set of factors in German and Jewish history than the mere need of a whipping boy. Moreover, it is incorrect to say that "modern anti-Semitism was born in Germany during the business depression after 1873" (p. 314). Modern German anti-Semitism has a tradition that goes back at least to the first decade of the nineteenth century.

In his own explanation of the emergence of National Socialism Professor Schuman seems to have developed two contradictory interpretations. He begins his book as an ardent disciple of Lasswell and the psychopathic interpretation of political behavior. National Socialism is to be explained in terms of "the mechanism of the conditioned reflex . . . of 'kinetic substitutes' or 'stereotypes' and of the processes of 'non-logical inference' or non-logico-experimental thinking" (p. 98-99). It is the product of "acute paranoia with all its typical delusions of persecution and systematic hallucinations of grandeur" (p. 109). Towards the end of the volume, however, we get a sudden shift to a Marxian interpretation, and we find the

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author quoting with approval the statements of John Strachey and R. Palme Dutt that "Fascism is the social philosophy and the state form of the bourgeoisie in the full monopolistic epoch of late capitalism" (p. 480). It is hardly necessary to labor the point that two such interpretations are incompatible.

The study of National Socialism as a whole must be distinguished from the study of its leader, Adolf Hitler. Rudolf Olden, a former editor of the *Berliner Tageblatt* and now in exile, presents a vivid psychological study of the person and career of the *Führer*. Of particular significance is his critical analysis of Hitler's autobiography in which he attempts to show how much of Hitler's early life has been intentionally obscured and perverted in order to create a myth. The leader of National Socialism is presented as an agitator whose "one aim was to hypnotize", who "lives only in externals, in marches and parades, in flags and banners, in the adulation of the world, in the enthusiastic love of his friends, in the din of battle, in the passionate cries of women and above all in endless torrential speech" (p. 100). Olden regards Hitler as a mere pawn of the Reichswehr, and he concludes with the statement that the Reichswehr is the force which will one day remove the present leader from power. One wishes that the author had seen fit to document his book with citations and sources for the numerous quotations and statements.

KOPPEL S. PINSON

NEW YORK CITY

The Diplomacy of the American Revolution. By SAMUEL FLAGG BEMIS. New York and London, D. Appleton-Century Company for The American Historical Association, 1935.—xiii, 293 pp. $3.50.

The outstanding value of Professor Bemis' accomplishment lies in the fact that he has brought together in one volume the policies and points of view of all the principal participants in the war of the American Revolution. The book emphasizes the epidemic character of war. The revolt of the colonies stirred so many jealousies and ambitions among the powers that eventually a general conflict resulted. The attitudes of the colonists, as well as of Great Britain, France, Spain, The Netherlands, and, to a less extent, the principal neutrals, are presented in one composite treatment. At the beginning of the Revolution the Americans were inclined toward isolation but they were forced by circumstances to look to Europe. Munitions were essential to military success, and these had to be procured from across

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the Atlantic. The embargo against exports was lifted to provide the exchange for the purchase of arms. The search for credits began. Eventually the initial policy of isolation was abandoned for the French Alliance of 1778. France desired to strike a blow at England. Spain was brought in by France on the understanding that Gibraltar was to be recovered, but Spain was not an ally of the United States and did not recognize American independence during the conflict. Holland played the now familiar rôle of the neutral profiteer who reaches for gold but grasps only the hot ashes of war. The European origins of the American doctrine of the freedom of the seas are set forth. The mercantile world was for trade purposes placed in opposition to Great Britain, the greatest sea power. The French government forbade its armed ships to molest neutral shipping traveling to non-blockaded ports except when carrying contraband. Thus France attempted to advance the new doctrines of freedom of trade in order to make use of neutral shipping and to rally neutral sentiment against the British whose ruthless destruction of commerce had created widespread resentment. The Armed Neutrality of 1780 was organized, including as its first members, Russia, Sweden and Denmark. This group favored the doctrine of free ships —free goods, a narrow definition of contraband, and the exclusion of paper blockades.

In the peace negotiations toward the end of the war the American commissioners were instructed to proceed only under the full confidence and advice of the French government. The commission, as is well known, broke these instructions and negotiated directly with the British without the advice of the French. The author departs from the conventional explanation of this breach. It is usually explained that Franklin was opposed to independent negotiations but changed his mind under pressure from Jay and Adams. Dr. Bemis introduces a confidential memorandum presented at the beginning of the negotiations to Oswald, a British negotiator, in which Franklin outlined the American terms of peace. The memorandum had been drawn up by Franklin without consulting the French. It is concluded from this that Franklin was first to violate the instructions of Congress.

The author has drawn heavily upon original sources in many archives; but he retains a broad view, stressing main principles and avoiding the confusion of multitudinous details. Clarity and perspective are chief among the highly commendable characteristics of his work, which will stand for a long time as a classic in its field.

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The Interstate Commerce Commission: A Study in Administrative Law and Procedure. Part III, Volume A and Volume B. By I. L. SHARFMAN. New York, The Commonwealth Fund; London, Humphrey Milford, Oxford University Press, 1935 and 1936. —xii, 684 pp.; xiv, 833 pp. $4.50; $5.00.

The high standard set by Professor Sharfman in the first two volumes of his treatise upon the Interstate Commerce Commission has been fully maintained in the third and fourth volumes. Having discussed the legislative basis of the Commission's authority and the scope of the Commission's jurisdiction in the first and second books of the series, the author next dealt with the Commission's activities, expecting, at the outset, to cover this third part of his work in one volume; but he found that an adequate presentation of the subject required two large volumes. Accordingly, Part Three includes Volume A, which, after setting forth the extent and diversity of the Commission's activities, discusses in detail the work done by the Commission in the valuation of railroad property, and in controlling railroad organization and finance; while Volume B is concerned with the regulation of the rates of carriers subject to the Commission's jurisdiction.

Throughout his work, but with increasing emphasis as it has progressed, Dr. Sharfman has sought to make his volumes a compendium of information regarding legislation for the regulation of interstate carriers, concerning the Commission's interpretation and administration of the successive enactments embodied in the present interstate commerce act as amended, and as to the interpretation which the courts have given legislation and commission action. The author, however, has not stopped with the compilation, classification and analysis of information. He has passed critical judgment, usually but not always favorable, upon the Commission's decisions and policies; and, because of his comprehensive knowledge of the subject discussed, his opinions will have much weight with all students of transportation regulation. Dr. Sharfman's attitude is at all times that of an unbiased student; and, while, for the most part, he estimates highly the constructive policies that the Commission has developed and followed, he disagrees with some of its important decisions. An instance of this is found in the judgment he pronounces upon the refusal of the Commission to give the carriers the financial relief they sought in the rate advance cases of 1915, the opinion being expressed that " In the light of this record, the position of the dissenting com-

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missioners appears to have been more soundly grounded than that of the majority". Contrariwise, the Commission is criticized for not having reduced railroad rates as a result of the rate level investigation of 1933, the opinion of Dr. Sharfman being, "The Commission's failure to reduce railroad freight rates, despite the great disparity between commodity prices and transportation charges, was tantamount, as in connection with the emergency advances of 1931, to permitting the rail lines to exploit their monopoly position with respect to so-called non-competitive traffic."

While Professor Sharfman's volumes, of which there will be at least five when the work is completed, will be appreciated by the general student of transportation who reads the books as a part of the literature covering the field of his studies, the volumes will also be of great assistance to one seeking information on some problem or phase of government regulation of carriers, such as the Commission's control of railroad construction and abandonment, of railroad combinations, of railroad financiering, and of railroad valuation. The decisions reached by the Commission in important cases of different kinds may be readily studied, as may also the rate-making policies of the Commission. The author's method of treating the subjects discussed makes the study of special subjects convenient and instructive.

To the author's discussion of each subject there are appended footnotes containing pertinent quotations from the decisions and findings of the Commission, dissenting commissioners and the courts. Fully half of each volume is in the footnotes; and, while this does not contribute to speed and fascination of reading, it does add to the value of the volumes as compendia of information. Moreover, this information is made easily obtainable by the special student of particular topics by means of the full table of cases and the complete subject index included in each volume. By the form and arrangement he has given his presentation as well as by the wealth of information contained in his volumes, Professor Sharfman has placed all students of transportation under a lasting debt of gratitude. They will await with much interest the concluding volume of his work.

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